89-1742

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

CLEVELAND CHRISTMAS,

Petitioner,

v.

JOSEPH MARSON, DOUGLAS BAKER, CHARLES MURPHY, ROBERT ADAIR, SANDRA GREENBERG, KENNEDY SHAW, JACK DRAKEFORD, THE CITY OF ENGLEWOOD

JOSEPH MARSON, DOUGLAS BAKER, CHARLES MURPHY, ROBERT ADAIR, SANDRA GREENBERG, KENNEDY SHAW, JACK DRAKEFORD,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether, under *Owens v. Okure*, ___ U.S. ___, 109 S. Ct. 573 (1989), an action pursuant to 42 U.S.C. §§ 1983 and 1985 is subject to New Jersey's six year statute of limitations, a residual statute that historically applied to actions on the case, or New Jersey's two year statute, historically applied to torts involving direct physical injury.

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JURISDICTION

This is a petition for certiorari seeking review of a judgment of the Third Circuit Court of Appeals rendered on an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

Fourteenth Amendment, § 1,
United States Constitution

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2A:14-1. 6 Years

Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this Title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, shall be commenced within 6 years next after the cause of any such action shall have accrued.

This section shall not apply to any action for breach of any contract for sale governed by section 12A:2-725 of the New Jersey Statutes.

2A:14-2. 2 Years; Actions for Injuries to Person by Wrongful Set

Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a Statute of the District of Columbia.

42 U.S.C. § 1985(3)
Depriving Persons of Rights or Privileges

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery

of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

This civil rights action pursuant, *inter alia*, to 42 U.S.C. §§ 1983 and 1985 was commenced in the United States District Court for the District of New Jersey on December 7, 1984. The defendants are several officials of the City of Englewood and its fire department. The plaintiff is Cleveland Christmas, a black man who was formerly employed by the City of Englewood Fire Department. Christmas asserts that his June 1981 discharge from the fire department on disability grounds was racially motivated. He further contends that he was the victim of racial discrimination and harassment during the course of his employment. App. 6.

This case came to the Court of Appeals for the Third Circuit as an interlocutory appeal under 28 U.S.C. § 1292(b) involving a controlling question of law. The issue before that Court was whether the district court erred in ruling that under the Supreme Court's recent opinion in *Owens v. Okure*, ___ U.S. ___, 109 S. Ct. 573 (1989), the plaintiff's claims under 42 U.S.C. §§ 1983 and 1985 are governed by New Jersey's six year statute of limitations, N.J. Stat. Ann. § 2A:14-1 (West 1987). App. 6.

This case has a somewhat complex procedural history. Following his discharge from the Englewood Fire Department, Christmas commenced a civil action against the City in the Law Division of the New Jersey Superior

Court. That proceeding was limited to issues involving the City's alleged failure to give Christmas proper notice of the disability hearing that led to his discharge. The Law Division dismissed the action, holding that proper notice had been given. App. 6.

After unsuccessful state appeals, on December 7, 1984, Christmas commenced the present employment discrimination action against the City of Englewood ("City")[1] and several of its officials. The individual defendants are Fire Chief Joseph Marson, Deputy Fire Chief Douglas Baker, Fire Captain Charles Murphy, Dr. Robert Adair, Mayor Sandra Greenberg, City Manager Kennedy Shaw, and City Clerk Jack Drakeford. App. 7.

The complaint in this action, raises claims under the First and Fourteenth Amendments to the U.S. Constitution; 42 U.S.C. §§ 1983, 1985, and 1986; the New Jersey Law Against Discrimination, N.J. Stat. Ann. § 10:5-1, *et seq.*; and various state law theories. App. 7. On July 11, 1986, the district court affirmed a U.S. Magistrate's ruling that the City did not plead and therefore waived its affirmative res judicata and statute of limitations defenses. The individual defendants thereafter moved for summary judgment on the grounds of collateral estoppel, res judicata, and the statute of limitations. In a May 11, 1987 bench opinion, which was followed by a June 15, 1987 order, the district court held that Christmas was barred by the doctrines of res judicata and collateral

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[1] The City was not an appellant below and will not be a respondent in this Court.

estoppel from relitigating certain claims and issues involved in the state action. The court dismissed the claims under 42 U.S.C. § 1986 as barred under that statute's one year limitations period. The court held that under *Wilson v. Garcia*, 471 U.S. 261 (1985), the plaintiff's 42 U.S.C. §§ 1983 and 1985 claims were governed by New Jersey's two year statute of limitations, N.J. Stat. Ann. 2A:14-2 (West 1987). In a March 9, 1988 opinion and order, the district court held that *Wilson* applied retroactively to the plaintiff's complaint and therefore dismissed his §§ 1983 and 1985 claims against all of the individual defendants.[2] The court declined to exercise pendent jurisdiction over the petitioner's remaining state claims against the defendants, but retained ancillary jurisdiction over the City's cross-claims against the individual defendants. App. 8.

On February 27, 1989, after this Court issued its opinion in *Owens v. Okure, supra*, the district court granted the plaintiff's motion for reconsideration of its prior order. The court ruled that under *Owens*, New Jersey's six year statute of limitations, N.J. Stat. Ann. § 2A:14-1, applied to §§ 1983 and 1985 claims in New Jersey. On April 12, 1989, the district court ruled in a bench opinion that *Owens* applied retroactively to the plaintiff's case. The court reinstated Christmas's claims against the individual defendants under §§ 1983 and 1985 and the New Jersey Law Against Discrimination. App. 18 to 32 and App. 69 to 82.

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[2] The claims against the City were not dismissed because the City was deemed to have waived a statute of limitations defense by failing to plead it.

On April 25, 1989, the district court, concluding that its ruling on the statute of limitations issue satisfied the criteria of 28 U.S.C. § 1292(b), certified the following issue for interlocutory review:

> Whether N.J. Stat. Ann. § 2A:14-1 or § 2A:14-2 should apply to § 1983 and § 1985 actions in New Jersey in light of *Owens v. Okure*, 109 S. Ct. 573 (1989).

App. 8.

On January 3, 1990, the Third Circuit, reversing the district court, held that New Jersey's two year statute of limitations applied to actions pursuant to 42 U.S.C. §§ 1983 and 1985. App. 1 to 10.

On February 7, 1990, the Third Circuit denied plaintiff's petition for rehearing.

POINT I

CERTIORARI SHOULD BE GRANTED TO PREVENT A SPLIT OF AUTHORITY BETWEEN STATE AND FEDERAL COURTS IN NEW JERSEY WITH REGARD TO THE STATUTE OF LIMITATIONS APPLICABLE TO ACTIONS UNDER 42 U.S.C. §§ 1983 AND 1985.

The Third Circuit's ruling in this case is so widely at variance with this Court's ruling in *Owens v. Okure*, ___ U.S. ___, 109 S. Ct. 573 (1989) as well as long-settled state law governing statutes of limitations, that it will inevitably trigger a substantial split of authority between the state and federal court systems in New Jersey. Moreover, because of the dramatic compression of the statute of limitations caused by the Third Circuit's decision, from

six years to two years, that ruling will have correspondingly dramatic impact upon civil right cases pending and for years to come. Certiorari should be granted to prevent these consequences.

In this case the circuit court ruled that New Jersey's two year statute of limitations, N.J. Stat. Ann. 2A:14-2, rather than its residual six year statute, N.J. Stat. Ann. 2A:14-1, applies to actions under 42 U.S.C. §§ 1983 and 1985. In so ruling, the panel that decided this case deemed itself bound by and adopted the reasoning of *Cito v. Bridgewater Township Police Department*, No. 89-5397 (3d Cir., Dec. 18, 1989), App. 11 to 17. *Cito, supra*, strays far from the holding and reasoning of *Owens v. Okure*, ___ U.S. ___, 109 S. Ct. 573 (1989).

Owens, supra, holds that when a state has various statutes of limitations for various torts, arising historically from actions in trespass *vi et armis*, and a residual statute, arising historically from actions on the case, then the residual statute applies to actions under 42 U.S.C. § 1983[3] because such actions are closely akin to actions on the case:

> [A]t the time the Civil Rights Act was enacted [,] [a]lmost all states had two types of personal

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[3] *Owens v. Okure, supra*, specifically identifies New Jersey as a state with multiple statutes of limitations for intentional torts thereby designating New Jersey as a state whose residual statute should govern actions under 42 U.S.C. § 1983. *Id.* 109 S.Ct. at 578-579, n.8 and text. Indeed, in the cited footnote, this Court singles out the phrase "tortious injuries to the rights of another" as the relevant phrase of the residual statute, *id.* at 579, a phrase of considerable significance as discussed *infra*, because it has its genesis in older versions of the six year statute that governed actions on the case.

> injury claims: trespass and trespass or action on the case. [citations omitted] Trespass claims covered direct injury and action on the case indirect injury. [citation omitted] The paradigmatic section 1983 claim in 1871 involved a victim of violence or harassment who sued state officials for failing to prevent harm; involving indirect injury, it would have been covered by the action on the case doctrine, including relevant statute of limitations. *Because most states have replaced action on the case with the general personal injury or residual provisions, and trespass with specialized intentional tort provisions, history supports the application of the former to section 1983 claims.*

Owens, supra, 109 S.Ct. at 581 n.11. (Emphasis supplied)

In New Jersey, the statute of limitations that originally governed actions on the case has been replaced by the six year residual statute.[4] The statute of limitations for trespass *vi et armis,* i.e. for direct physical injury, has come to be replaced by the two year statute. That is not a matter of historical conjecture. The New Jersey Supreme

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[4] *Owens v. Okure, supra,* clearly requires that residual statutes apply to federal civil rights actions in states, like New Jersey, with multiple statutes of limitations for intentional torts. Apparently, in order to satisfy that requirement, *Cito,* characterizes the two year statute as a "residual" statute and portrays the New Jersey statutory scheme as embodying two residual statutes, a logically impossible situation: "New Jersey's six year residual statute is not the residual statute to which the *Owens* holding must be applied; *its two year residual statute is*". *Cito, supra,* App. 16. As *Owens* pointed out "the very idea of a general or residual statute suggests that each state would have no more than one," *id.* at 580. New Jersey has only one residual statute, the six year statute. That is what applies here.

Court has so held in a decision, not cited in *Cito*, that thoroughly canvasses almost two hundred years of statutory history.

In *Earl v. Winne*, 14 N.J. 119 (1953), the Supreme Court of New Jersey, including then New Jersey Supreme Court Justice Brennan, had to decide the applicable statute of limitations for several torts including false imprisonment, malicious prosecution and abuse of process. The defendants in *Earl* argued that New Jersey's two year statute applied to all three torts pointing to the same language the Third Circuit relied upon in this case and *Cito, supra*, to wit, the two year statute coverage of "every action at law for an *injury to the person* . . . ", N.J. Stat. Ann. 2A:14 (Emphasis supplied)

Earl, supra, held that the phrase "injury to the person" in the two year statute arose from the statute of limitations governing actions in trespass *vi et armis*, while the phrase in the six year statute, "tortious injury to the rights of another . . . " arose historically from the statute governing actions on the case. *Id.* at 129 to 132. *Earl* reasoned further that since the tort of false imprisonment involved direct action upon the physical person, while the torts of malicious prosecution and abuse of process involved only indirect action against the person, the former tort was covered by the two year statute while the latter tort was covered by the six year statute.

Earl v. Winne, supra, at 129 to 132, established the following history of New Jersey's statute of limitations:

1. As of February 7, 1779, New Jersey had "An Act for the Limitation of Actions" consisting of 17 subsections. The first three sections are relevant to this inquiry. (The 1799 Act is reproduced at App. 33 to 39)

2. The first section of the 1799 Act was the six year limitation period. Among other things, it explicitly governed *"all actions* of account and *upon the case*, except actions for slander . . . " The second section, a four year statute, covered trespass actions involving direct physical harm such as "assault, menace, battery, wounding and imprisonment . . . " The third section applied a two year statute to "actions upon the case for words", probably a reference to libel. App. 33.

3. A revision approved March 27, 1874, retained the six year statute for "all actions . . . upon the case" and the four year statute for trespass *vi et armis*. (See the 1874 statute at App. 40 *et seq.*).

4. In 1896, the legislature passed a new section 3 which retained the two year limitation for "action upon the case for words" *i.e.* libel, but added to the two year statute "all actions *for injuries to persons* caused by wrongful act, neglect or default of any person . . . " That new section, the precursor of New Jersey's current two year statute impliedly repealed Section 2, the four year statute for trespass *vi et armis*. The phrase "injuries to persons" was meant to embrace only direct physical injury torts such as "assault, menace, battery, wounding," etc.[5] The

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[5] "Certainly it cannot be denied that the common law action for trespass *vi et armis* was comprehended by the phrase 'injury to persons caused by wrongful act . . . ' " *Earl, Supra*, at 130 to 131.

language was not intended to repeal the applicability of the six year statute to actions on the case. (See the 1896 Act at App. 54).

5. In a 1934 revision, the six year statute continued to apply to all "actions in the nature of actions upon the case" and was designated R.S. 2:24-1. The two year statute that originally specified "menace, assault, mayhem, etc." was replaced by the language of the 1896 revision referring to "injuries to the person" and libel and slander were given a one year statute in section 3, now designated R.S. 2:24-3. (See R.S. 2:24-1 to 2:24-3 at App. 56 to 57).

6. In a "recent revision" referred to but not identified by date in *Earl v. Winne, supra*, 14 N.J. at 131, section 1 of the act was re-written and the phrase "any tortious injury to the rights of another" was substituted for the specific common law reference to "action on the case".

In sum, the words in N.J. Stat. Ann. 2A:14-1 "any tortious injury to the rights of another" means all actions "in the nature of actions on the case" R.S. 2:24-1; the phrase "injuries to persons" in N.J. Stat. Ann. 2A:14-2 refers to actions only in trespass *vi et armis, i.e.* actions resulting only from direct physical injury such as medical malpractice, assault and battery.

Importantly, one of the factors that led the *Earl* court to distinguish false imprisonment from malicious prosecution and to apply the six year statute to the latter was that false imprisonment need not be committed under

color of law while malicious prosecution, although ultimately leading to unjust imprisonment, is committed under color of law and is therefore in the nature of an action on the case:

> The fundamental difference between an action for malicious prosecution and one for false imprisonment is that in the former the detention is malicious, *but under due forms of law, whereas in the latter the detention is without color of legal authority.*

Earl v. Winne, 14 N.J. at 128. (Emphasis supplied)

Like an action for malicious prosecution, a claim under 42 U.S.C. sec. 1983 involves a tortious injury to one's rights "under color of state law", Under *Earl,* then the six year statute governs a federal civil rights action because such an action is in the nature of an action upon the case. *Owens v. Okure, supra,* 109 S.Ct. at 581 n.11.

The historical analysis and holding of *Earl, supra,* have had great vitality in New Jersey up to the present day. In *Canessa v. Kislak, Inc.,* 97 N.J. Super. 327 (L.Div. 1967), a New Jersey court again canvassed the history of the statute of limitations and determined, *inter alia,* that the statute of limitations applicable to a claim for invasion of privacy was the six year statute even where the gravamen of the damages was emotional distress. Relying upon *Earl v. Winne, supra,* and a long line of precedent, the court in *Canessa* held that historically the phrase "injury to the person" in the two year statute applies only to direct physical injury, not to tortious violations of rights that lead indirectly to physical or emotional injury:

> In *Kearny v. Mallon Suburban Motors,* 23 N.J. Misc. 83 (Cir. Ct. 1945), defendant moved for

judgment on the ground that the action was one for "injuries to the person" under the relevant statute of limitations, R.S. 2:24-2. Circuit Judge William A. Smith held that the phrase "injuries to the person"

> "*means physical injury* and that *actions on the case*, other than physical injuries covered by section 2 and actions for libel and slander covered the present section 3, 2:24-3, which is a one year limitation, *are still covered by the six year limitation contained in the first section of the present revision.*
>
> The gist of the action of malicious prosecution is for an injury to the personal rights as distinguished from injuries to the person. Subsequent arrest and imprisonment are matters of damage but not necessary to be sustained in order to give right to the action of malicious prosecution in so far as the charge that the criminal actions was maliciously prosecuted. *Hammill v. Mack International Motor Truck Corp.*, 104 N.J.L. 551, 441 A. 775.
>
> It is my conclusion that the statute of limitations applying to the action for malicious prosecution is section 2:24-1, fixing the period of limitation as six years, and that this action now before the court is not barred by the statute of limitations."

Canessa, supra 97 N.J. Super at 353-354 quoting *Kearny v. Mallon Suburban Motors*, 23 N.J. Misc. 83, 88 (Cir. Ct. 1945).

In holding that the six year statute covers a personal injury action alleging invasion of privacy, *Canessa* followed a long line of cases applying the six year statute to various personal injury actions that, historically, were akin to actions on the case including *Crane v. Ketcham*, 83

N.J.L. 327 (Sup. Ct. 1912) (alienation of a wife's affections) and *McGrath v. Keenan*, 24 N.J. Misc. 121 (C.P. 1946) (malicious prosecution).

If *Cito* were correct that New Jersey's six year statute of limitations does not apply to personal injury actions, then cases like *Earl v. Winne*, *Canessa v. Kislak*, *Crane v. Ketcham* and *McGrath v. Keenan*, all *supra*, would not exist. They exist however, so *Cito* must be wrongly decided.

Indeed, over the years, federal and state courts have correctly applied New Jersey's six year statute to an ever-widening range of personal injury actions including employment discrimination actions, like this case, brought under 42 U.S.C. § 1983, *Skadegaard v. Farrell*, 578 F.Supp. 1209 (D.N.J. 1984), employment discrimination actions brought under New Jersey's Law Against Discrimination N.J. Stat. Ann. 10:5-1 *et seq.*, *Fisher v. Quaker Oats Co.*, 233 N.J. Super 319, 320 (App. Div. 1989); *Nolan v. Otis Elevator Co.*, 197 N.J. Super 468, 473-474 (App. Div. 1984) *rev'd on oth'r grds*, 102 N.J. 30 (1986), *cert den.* 479 U.S. 820 (1986); *Lecse v. Doe*, 182 N.J. Super 315 (L.Div. 1981); legal malpractice claims, *Mant v. Gillespie*, 189 N.J. Super 368, 372 (App. Div. 1983); *Carney v. Finn*, 145 N.J. Super 234 (App. Div. 1976), and as discussed above, claims of abuse of process, alienation of affection, and malicious prosecution.

By failing to abide by almost 200 years of settled law in New Jersey, *Cito* and the holding in this case violate principles of federalism inherent in the statutory scheme of our federal civil rights laws as well as the rationale of *Owens v. Okure*, *supra*. In that decision, this Court sought national uniformity not by imposing its own statute of

limitations upon federal civil rights claims, as in, *e.g. DeiCostello v. Teamsters*, 462 U.S. 151 (1983), but rather by "borrowing", *Owens, supra* 109 S.Ct. at 574, 576, the relevant state statutes. *Owens, supra*, counsels federal courts to look to state "judicial construction", *id.* 582 n.12, in selecting the residual statute that historically arose from actions on the case. In requiring careful deference to state statutes of limitation and relevant state judicial construction, *Owens, supra*, obeys the statutory mandate of Congress: "Titie 42 U.S.C. Sec. 1988 endorses the borrowing of state law limitations provisions where doing so is consistent with federal law." *Id.* at 576.

The Third Circuit should have deferred to the holding and historical analysis of the New Jersey Supreme Court in *Earl v. Winne*, 14 N.J. 119 (1953), its progeny, and related cases. An action under 42 U.S.C. § 1983 is *not*, as the Third Circuit holds in *Cito*, akin to a husband's *per quod* action derived from his wife's medical malpractice claims as delineated in *Rex v. Hutner*, 26 N.J. 489 (1958). App. 5. *Owens v. Okure, supra*, holds that a federal civil rights action is in the nature of an action on the case. Since at least 1799, such actions have been governed by New Jersey's six year residual statute of limitations.

CONCLUSION

Certiorari should be granted to remedy the Third Circuit's broad deviation from *Owens v. Okure*, ___ U.S. ___, 109 S.Ct. 573 (1989). Absent relief in this Court, New Jersey's state courts will inevitably apply a six year statute of limitations to federal civil rights action while federal courts in the District of New Jersey will apply a two year statute, a result that will cause friction and embarrassment between and among the two court systems.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5498

CLEVELAND CHRISTMAS

v.

JOSEPH MARSON, DOUGLAS BAKER,
CHARLES MURPHY, ROBERT ADAIR,
SANDRA GREENBERG, KENNEDY SHAW,
JACK DRAKEFORD, THE CITY OF ENGLEWOOD

JOSEPH MARSON, DOUGLAS BAKER,
CHARLES MURPHY, ROBERT ADAIR,
SANDRA GREENBERG, KENNEDY SHAW,
JACK DRAKEFORD,

Appellants

On Appeal from the United States District Court
for the District of New Jersey (Newark)
(D.C. Civil Action No. 84-5042)
District Judge: Hon. Harold A. Ackerman

Argued November 14, 1989

Before: HIGGINBOTHAM and SCIRICA, *Circuit Judges*,
and HUTTON, *District Judge*.*

---

* Honorable Herbert J. Hutton, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel November 14, 1989.

On consideration whereof, it is now here ordered and adjudged by this Court that the April 25, 1989 order of the said District Court, be, and the same is hereby reversed to the extent held that claims under 42 U.S.C. § 1983 and 1985 arising in New Jersey are not governed by the two year statute of limitations period of N.J. Stat. Ann § 2A:14-2 and the cause is remanded to the said District Court for further proceedings consistent with the opinion of this Court. Both parties to bear their own costs.

ATTEST:

/s/ Sally Mrvos
Clerk

January 3, 1990

Certified as a true copy and issued in lieu of a formal mandate on February 15, 1990.

Test:/s/ M. Elizabeth Ferguson

Chief Deputy Clerk, United States Court of Appeals, for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5498

CLEVELAND CHRISTMAS

v.

JOSEPH MARSON, DOUGLAS BAKER,
CHARLES MURPHY, ROBERT ADAIR,
SANDRA GREENBERG, KENNEDY SHAW,
JACK DRAKEFORD, THE CITY OF ENGLEWOOD

JOSEPH MARSON, DOUGLAS BAKER,
CHARLES MURPHY, ROBERT ADAIR,
SANDRA GREENBERG, KENNEDY SHAW,
JACK DRAKEFORD,

Appellants

(D.C. Civil Action No. 84-5042)

SUR PETITION FOR REHEARING

Present: HIGGINBOTHAM, *Chief Judge*, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and NYGAARD, *Circuit Judges*.

The petition for rehearing filed by plaintiff-appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having

voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

/s/ A. Leon Higginbotham, Jr.
Circuit Judge

Dated: FEB 7 1990

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5498

CLEVELAND CHRISTMAS

v.

JOSEPH MARSON, DOUGLAS BAKER,
CHARLES MURPHY, ROBERT ADAIR,
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JOSEPH MARSON, DOUGLAS BAKER,
CHARLES MURPHY, ROBERT ADAIR,
SANDRA GREENBERG, KENNEDY SHAW,
JACK DRAKEFORD,
Appellants

On Appeal from the United States District Court
for the District of New Jersey (Newark)
(D.C. Civil Action No. 84-5042)
District Judge: Hon. Harold A. Ackerman

Argued November 14, 1989

Before: HIGGINBOTHAM and SCIRICA, *Circuit Judges*,
and HUTTON, *District Judge*.*

(Filed JAN 3 1990)

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*Honorable Herbert J. Hutton, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

PER CURIAM:

This civil rights action was commenced in the United States District Court for the District of New Jersey on December 7, 1984. The appellants are several officials of the City of Englewood and its fire department. The appellee is Cleveland Christmas, a black man who was formerly employed by the City of Englewood Fire Department. Christmas asserts that his June 1981 discharge from the fire department on disability grounds was racially motivated. He further contends that he was the victim of racial discrimination and harassment during the course of his employment.

This case comes to us as an interlocutory appeal under 28 U.S.C. § 1292(b) involving a controlling question of law. The issue before this court is whether the district court erred in ruling that under the Supreme Court's recent opinion in *Owens v. Okure*, 109 S.Ct. 573 (1989), the appellee's claims under 42 U.S.C. §§ 1983 and 1985 are governed by New Jersey's six year statute of limitations, N.J. Stat. Ann. § 2A:14-1 (West 1987).

I.

This case has a somewhat convoluted procedural history. Following his discharge from the Englewood Fire Department, Christmas commenced a civil action against the City in the Law Division of the New Jersey Superior Court. By stipulation, the parties limited the issues to those involving the City's alleged failure to give Christmas proper notice of the disability hearing that led to his discharge. The Law Division dismissed the action, holding that proper notice had been given.

On December 7, 1984, Christmas commenced the present employment discrimination action against the City of Englewood ("City") and several of its officials. The individual defendants ("appellants")[1] are Fire Chief Joseph Marson, Deputy Fire Chief Douglas Baker, Fire Captain Charles Murphy, Dr. Robert Adair, Mayor Sandra Greenberg, City Manager Kennedy Shaw, and City Clerk Jack Drakeford.

The appellee's complaint in this action raises claims under the first and fourteenth amendments to the U.S. Constitution; 42 U.S.C. §§ 1983, 1985, and 1986; the New Jersey Law Against Discrimination, N.J. Stat. Ann. § 10:5-1, *et seq.*; and various state law theories. On July 11, 1986, the district court affirmed a U.S. Magistrate's ruling that the City did not plead and therefore waived its affirmative res judicata and statute of limitations defenses. The individual defendants thereafter moved for summary judgment on the grounds of collateral estoppel, res judicata, and the statute of limitations. In a May 11, 1987 bench opinion, which was followed by a June 15, 1987 order, the district court held that Christmas was barred by the doctrines of res judicata and collateral estoppel from relitigating certain claims and issues involved in the state action. The court dismissed the claims under 42 U.S.C. § 1986 as barred under that statute's one year limitations period. The court held that under *Wilson v. Garcia*, 471 U.S. 261 (1985), the plaintiff's 42 U.S.C. §§ 1983 and 1985 claims were governed by New Jersey's two year statute of limitations, N.J. Stat. Ann. 2A:14-2 (West 1987). In a March 9, 1988 opinion and order, the

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[1] The City of Englewood is not an appellant in this action.

district court held that *Wilson* applied retroactively to the appellee's complaint and therefore dismissed his §§ 1983 and 1985 claims against all of the appellants. The court declined to exercise pendent jurisdiction over the appellee's remaining state claims against the appellants, but retained ancillary jurisdiction over the City's cross-claims against the individual defendants.

On February 27, 1989, after the Supreme Court issued its opinion in *Owens v. Okure, supra,* the district court granted the plaintiff's motion for reconsideration of its prior order. The court ruled that under *Owens,* New Jersey's six year statute of limitations, N.J. Stat. Ann. § 2A:14-1, applied to § 1983 claims in New Jersey. On April 12, 1989, the district court ruled in a bench opinion that *Owens* applied retroactively to the appellee's case. The court reinstated Christmas's claims against the appellants under §§ 1983 and 1985 and the New Jersey Law Against Discrimination.

On April 25, 1989, the district court, concluding that its ruling on the statute of limitations issue satisfied the criteria of 28 U.S.C. § 1292(b), certified the following issue for interlocutory review:

> Whether N.J. Stat. Ann. § 2A:14-1 or § 2A:14-2 should apply to § 1983 and § 1985 actions in New Jersey in light of *Owens v. Okure,* 109 S.Ct. 573 (1989).

II.

The sole issue before us is whether the district court correctly held that *Owens v. Okure* changed the statute of limitations for § 1983 and § 1985 claims from the two year

statute governing "every action at law for an injury to the person caused by the wrongful act, neglect or default of any person", N.J. Stat. Ann. § 2A:14-2, to the six year statute which is applicable to "[e]very action at law . . . for any tortious injury to real or personal property, . . . [and] for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3." N.J. Stat. Ann. § 2A:14-1.

After oral argument in this case, another panel of this court resolved the statute of limitations problem raised here. In *Cito v. Bridgewater Township Police Department*, No. 89-5397 (3d Cir. Dec. 18, 1989), this court held that *Owens* does not require that New Jersey's six year statute of limitations be applied to civil rights actions that arise in New Jersey. The court stated:

> In *Owens*, the Court held that where a state has one or more statutes of limitations for certain enumerated intentional torts and a residual statute for all other personal injury actions, the residual or general personal injury statute should be applied to claims brought under 42 U.S.C. § 1983. *Owens v. Okure*, 109 S.Ct. at 582. Appellants argue that *Owens* mandates application of the New Jersey six-year residual statute of limitations. N.J.S.A. 2A: 14-1. Appellants are correct that N.J.S.A. 2A: 14-1 is a residual statute, but incorrectly argue it applies to personal injury claims. Section 2A: 14-1 states, in pertinent part, that "every action . . . for any tortious injury to the rights of another not stated in Sections 2A: 14-2 or 2A: 14-3 . . . shall be commenced within six years." In *Rex v. Hunter*, 26 N.J. 489 (1958), the New Jersey Supreme Court held that N.J.S.A. 2A: 14-1, the six-year statute, did not apply to an action for an injury to the person.

> In this case, the district court did apply [N.J.S.A. 2A: 14-2] the New Jersey residual statute applicable to personal injuries to bar appellants' claims.
>
> . . .
>
> In light of the New Jersey Supreme Court's construction of its own state's statute, New Jersey's six year residual statute is not the residual personal injury statute to which the *Owens* holding must be applied; its two year residual statute is.

Typescript at 5-6.

We fully agree with the conclusion and rationale of our colleagues in *Cito*. We are, in any event, bound by the holding of the previous panel opinion. Internal Operating Procedures of the United States Court of Appeals for the Third Circuit, Chapter 8 (C).

III.

For the foregoing reasons, this court holds that claims under 42 U.S.C. § 1983 and § 1985 arising in New Jersey are governed by the two year limitations period of N.J. Stat. Ann. § 2A:14-2. Accordingly, to the extent that the district court's order of April 25, 1989 held otherwise, the order is reversed and the matter is remanded to the district court for further proceedings consistent with this opinion.

Both parties shall bear their own costs.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

Filed: December 18, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5397

PAUL T. CITO and THOMAS J. CITO,
Appellants

V.

BRIDGEWATER TOWNSHIP POLICE DEPARTMENT, LT. PETER SIBILIA, DET. ROBERT KLOUSE, OFF. RICHARD CELESTE, SOMERSET COUNTY PROSECUTOR'S OFFICE, ASSISTANT PROSECUTOR H. EDWARD GABLER, DEPUTY ASSISTANT PROSECUTOR LORI SPAGNOLI, ASSISTANT PROSECUTOR EDWARD COLEMAN, INVESTIGATOR MICHAEL MONN, OFFICE OF THE PUBLIC DEFENDERS SOMERSET COUNTY DISTRICT, PUBLIC DEFENDER MICHAEL C. SHALE, POOL ATTORNEY MICHAEL O. ROGERS, ASSIGNMENT JUDGE WILFRED P. DIANA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil Action No. 88-3109)

Submitted Under Third Circuit Rule 12(6)
On October 27, 1989

Before: SLOVITER, HUTCHINSON and NYGAARD, *Circuit Judges.*

(Opinion filed December 18, 1989)

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OPINION OF THE COURT

NYGAARD, *Circuit Judge.*

This pro se appeal challenges the propriety of an order dismissing appellants' Section 1983 action for failing to file within the time permitted by the New Jersey Statute of Limitations.[1] At issue is whether the New Jersey two-year limitation on personal injury actions or

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[1] Appellants allege that their action was brought pursuant to 28 U.S.C. § 1343; 42 U.S.C. § 1983; 42 U.S.C. § 1985(2); 42 U.S.C. § 1985(3); 42 U.S.C § 1986; 28 U.S.C. § 2201; 28 U.S.C. § 2202; and, various amendments to the United States Constitution. Appellants also asked the district court to exercise pendent jurisdiction for alleged violations of the New Jersey Constitution and various New Jersey criminal statutes.

the six-year residual limitation applies to this action following the United States Supreme Court decision in *Owens v. Okure*, 109 S. Ct. 573 (1989). We conclude there is a two-year limitation on appellants' action and will affirm.

I.

Appellants' complaint is a discursive statement of appellees' actions, none occurring later than August of 1983, which, nevertheless, alleges violations of appellants' civil rights. The complaint was filed in July, 1988. Appellees filed a motion under Rule 12 asserting, among other flaws, that the action was time-barred by N.J. Stat. Ann. 2A:14-2. The district court agreed and dismissed the complaint on April 3, 1989.[2]

We have jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review of this order granting appellees' motion to dismiss. *Wilson v. Rachmill*, 878 F.2d 772 (3d Cir. 1989). When reviewing a Rule 12(b)(6) dismissal on statute of limitations grounds, we must determine whether "the time alleged *in the statement of a claim* shows that the cause of action has not been brought within the statute of limitations." *Bethel v. Jendoco Construction Corp.*, 570 F.2d 1168, 1174 (3d Cir. 1978) (emphasis in original) (quoting *Hanna v. United States Veterans' Administration Hospital*, 514 F.2d 1092, 1094 (3d Cir. 1975)).

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[2] In addition, the district court dismissed several appellees under Rule 12(b) on grounds of immunity. Since we hold the action is time-barred, it is unnecessary to us to reach this issue.

II.

The facts which underlie this action are not significant to our review except to note that appellants allege they were deprived by appellees of certain civil rights in 1983. The statute of limitations for any Section 1983 claim is the state statute which limits actions for personal injuries. *Wilson v. Garcia*, 471 U.S. 261 (1985). "In New Jersey that statute is N.J.S.A. 2A:14-2, which provides that an action for an injury to the person caused by a wrongful act, neglect, or default, must be convened within two years of accrual of the cause of action." *Brown v. Foley*, 810 F.2d 55, 56 (3d Cir. 1987). Inasmuch as a claim pursuant to 42 U.S.C. § 1985(2) or 1985(3) is essentially an action in tort, *Farbenfabriken Bayer, A.G. v. Sterling Drug, Inc.*, 103 F. Supp. 589, aff'd 307 F.2d 210 (3d Cir. 1962) *cert. denied* 372 U.S. 929 (1963), the statutory limitation is likewise two years. Actions pursuant to Section 1986 are limited to "one year after the cause of action has accrued." 42 U.S.C. § 1986. Appellants' complaint is substantially out of time under Sections 1983, 1985 and 1986, and the district court properly dismissed the action.

Appellants argue that the United States Supreme Court's decision in *Owens v. Okure*, 109 S. Ct. 573 (1989) requires that we apply the New Jersey six-year statute of limitations rather than the two-year limitation which we applied to civil rights actions in *Brown v. Foley, supra*. In *Owens*, the Court held that where a state has one or more statutes of limitations for certain enumerated intentional torts and a residual statute for all other personal injury actions, the residual or general personal injury statute should be applied to claims brought under 42 U.S.C. § 1983. *Owens v. Okure*, 109 S. Ct. at 582. Appellants argue

that *Owens* mandates application of the New Jersey six-year residual statute of limitations. N.J.S.A. 2A:14-1. Appellants are correct that N.J.S.A. 2A:14-1 is a residual statute, but incorrectly argue it applies to personal injury claims. Section 2A: 14-1 states, in pertinent part, that "every action . . . for any tortious injury to the rights of another not stated in Sections 2A: 14-2 or 2A:14-3 . . . shall be commenced within six years." In *Rex v. Hunter*, 26 N.J. 489 (1958), the New Jersey Supreme Court held that N.J.S.A. 2A: 14-1, the six-year statute, did not apply to an action for an injury to the person.

In this case, the district court did apply the New Jersey residual statute applicable to personal injuries to bar appellants' claims. N.J.S.A. 2A:14-2 provides as follows:

> Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within two years next after the cause of any such action shall have accrued.

In light of the New Jersey Supreme Court's construction of its own state's statute, New Jersey's six-year residual statute is not the residual personal injury statute to which the *Owens* holding must be applied; its two-year residual statute is. We hold that the district court correctly applied the two-year statute.

Addressing appellants' contention that the district court should have exercised pendent jurisdiction over their state claims, in *Tully v. Mott Supermarkets, Inc.*, 540 F.2d 187, 196 (3d Cir. 1976) we said:

> The power of the court to exercise pendent jurisdiction, although largely unrestricted, requires,

> at minimum, a federal claim of sufficient substance to confer subject matter jurisdiction on the court. *Gibbs, supra,* 383 U.S. at 725, 86 S. Ct. 1130. The substantiality of the federal claim is ordinarily determined on the basis of the pleadings. If it appears that the federal claim is subject to dismissal under Fed. R. Civ. P. 12(b)(6) or could otherwise be disposed of in a motion for summary judgment under Fed. R. Civ. P. 56, then the court should ordinarily refrain from exercising jurisdiction in the absence of extraordinary circumstances.

There are no "extraordinary circumstances" justifying retention of pendent jurisdiction. The district court properly declined to exercise pendent jurisdiction.[3]

III.

Since appellants' claims were barred by the applicable statute of limitations, the order of the district court dismissing appellants' complaint will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[3] Appellants also sought to recover under a number of federal criminal statutes, including 18 U.S.C. §§ 242 and 243, and argued for the federal statute of limitations. The district court correctly decided, "these are criminal offenses, enforceable by the government rather than by citizen plaintiffs. Section 1983 is the civil counterpart of 18 U.S.C. § 242." Opinion typescript p. 3.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civil No. 84-5042

CLEVELAND CHRISTMAS, Plaintiff, -vs- JOSEPH MARSON, et al., Defendants.	TRANSCRIPT OF PROCEEDINGS OPINION

Newark, New Jersey
April 12, 1989

BEFORE:

THE HONORABLE HAROLD A. ACKERMAN, U.S.P.J.

Appearances:

SMITH, MULLIN & KIERNAN
BY: NEIL M. MULLIN, ESQ., and
NANCY ERIKA SMITH, ESQ.,
Attorneys for the Plaintiff

HOAGLAND, LONGO, OROPOLLO & MORAN
BY: JAMES J. KINNEALLY, III, ESQ.,
Attorneys for the Defendant City of Englewood

McDONOUGH, MURRAY & KORN
BY: PETER L. KORN, ESQ,.
Attorneys for the Defendant Dr. Adair

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER
BY: THOMAS F. QUINN, ESQ.,
Attorneys for all other defendants

(p. 15) I continue to say, one, your Honor was correct back in March of '88 when you applied the two-year statute; and, two, as I said before, I think, in any event, it should be applied prospectively, your Honor.

THE COURT: I thank both of you.

As I have pointed out in previous opinions regarding this case, this is an action which has been brought under the Civil Rights Act, 42 U.S.C. 1983, 1985, 1986 and 1988 and pendent state statutory and common law, seeking redress from the City of Englewood, New Jersey and various city officials for an employee termination allegedly motivated by racial discrimination.

On March 9, 1988, I dismissed the federal claims against the individual defendants as time-barred. I also dismissed the plaintiff's pendent state claim against the individual defendants.

On February 27, 1989, upon the plaintiff's motion for reconsideration of my March 9, 1988 order, I held that the United States Supreme Court's decision in *Owens v. Okure*, 109 S. Ct. 573 (1988) changed the applicable New Jersey state statute of limitations in Section 1983 actions from N.J. Stat. Ann. 2A:14-2 (two years) to New Jersey Stat. Ann. 2A:14-1 (six years).

I did not, however, rule on whether the change should be retroactively applied to the present case, because neither (p. 16) side submitted papers concerning the proper application of *Owens*, in light of *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971) and its progeny, including *Hill v. Equitable Trust Co.*, 851 F.2d 691, 697

(1988), the latest Third Circuit pronouncement on retroactive application of changed law.

Now that the parties have fully briefed the issue, and after careful consideration of their arguments, I'm prepared to decide whether I should apply retroactively to this action the change in law effected by *Owens, supra.*

First, let me say, as I pointed out orally at the beginning of this morning's proceedings, that I am in receipt of the correspondence sent to my office late yesterday afternoon. I am unpersuaded by the individual defendants' contentions that the Third Circuit's pronouncement concerning the applicable statute of limitations for Section 1983 actions in Pennsylvania applies to New Jersey as well.

As the plaintiff points out in his latest submission to this Court, the language in the relevant Pennsylvania statute, 42 Pa.C.S.A. Section 5524(7), stating that the two-year time period applies to "any other action or proceeding to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious conduct or any other action or proceeding sounding in trespass, including deceit or fraud, except an action or proceeding subject to another limitation specified in this subchapter" is akin to the (p. 17) language in our N.J. Stat. Ann. 2A:14-1, stating that the six-year period applies "for any tortious injury to the rights of another not stated in Sections 2A:14-2 and 2A:14-3 of this Title."

Hence, in view of this similarity, I remain unconvinced that the two-year statute of limitations should apply in light of Owens.

Also, before reaching the ultimate issue of retroactive, it's important to understand the Court's procedural posture. Normally, under the "law of the case" doctrine, when a court decides upon a rule of law in an action, that "rule should continue to govern the same issues in subsequent stages of the litigation." *Devex Corp. v. General Motors Corp.*, 857 F.2d 197 at 199 (3d Cir. 1988) (*citing Christianson v. Colt Indus. Operating Corp.*, 108 S. Ct. 2166 at 2177 (1988), *cert. denied*, 109 S. Ct. 1128 (1989); *see also* 181B J. Moore, J. Lucas & Currier, *Moore's Federal Practice* Paragraph 0.404(1), at 117.

Of course, a court may review its prior decisions but "as a rule courts should not loathe to do so in the absence of extraordinary circumstances." *See Devex Corp., cited supra*, at 199-200 (*quoting Christianson, cited supra*, at 2178).

This rule, however, expresses "the practice of courts generally to refuse to reopen what has been decided," not to limit their power. *See Messenger v. Anderson*, 225 U.S. 436, 444 (1912)

(p. 18) Courts may therefore revisit prior decisions on legal issues where there is substantially different evidence at a subsequent trial, *where there is no controlling authority*, or where the prior decision is clearly erroneous and would result in injustice. *See Handi Investment Co. v. Mobile Oil Co.*, 653 F.2d 391, 393 (9th Cir. 1981) (emphasis added); *see also Zichy v. City of Philadelphia*, 590 F.2d 503 at 508 (3d Cir. 1979), which states that, "(t)his Court has a duty to apply a supervening rule of law despite its prior decisions to the contrary when the new legal rule is valid and applicable to the issues of the case."

The validity and applicability of the new legal rule which the Court set down in the *Owens* case depends on the outcome of the *Chevron* test, which I have alluded to *supra*.

The Third Circuit lately described *Chevron* and the elements of the test that bears its name, stating that there are three qualifications for giving a ruling prospective effect only:

(1) The holding must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed;

(2) The merits and demerits in each case must be weighed by looking to the history of the rule in dispute, its purpose and effect, and whether retrospective operation will (p. 19) further or retard the rule's operation;

(3) Retrospective application must create the risk of producing substantially inequitable results.

Hill v. Equitable Trust Co., cited supra, at 696 (*citing Chevron, cited supra* at 106-107).

I will now assess whether or not these three requirements have been satisfied.

Mr. Christmas argues that they have not, while the individual defendants argue that they have.

Let me deal with the new principle of law factor.

In *Brown v. Foley,* 810 F.2d 55, (3d Cir. 1987), the Third Circuit indicated that the statute of limitations to be

applied in all cases brought under Section 1983 in New Jersey was the two-year statute of limitations codified at New Jersey Stat. Ann. Section 2A:14-2. The individual defendants in their earlier arguments to me, and, I, in my earlier decision regarding what limitations period to apply, relied on *Brown, supra,* and its observance that the two-year limitations period properly applied to Section 1983 actions.

The Third Circuit later reiterated the propriety of the two-year period in Section 1983 actions in *Napier v. Thirty or More Unidentified Federal Agents,* 855 F.2d 1080, 1087 (3d Cir. 1988). As I related in my February 27th opinion, *Owens, supra,* has changed all of that.

Now, according to the Supreme Court's formula in *Owens,* (p. 20) New Jersey's six-year residual statute of limitations should apply to Section 1983 actions. Hence, *Owens* has superseded *Brown's* and *Napier's* observation that 2A:14-2 is applicable to Section 1983 actions.

The plaintiff argues that the defendants cannot possibly succeed on the first prong of the *Chevron* test because *Owens* did not overrule "settled law." Mr. Mullin has reiterated that argument here this morning orally.

In this regard, the plaintiff asserts that at the time I granted the defendant's motion to dismiss based on the two-year time bar, relying on *Foley,* there was a definite split *in the circuits* on how to apply *Wilson v. Garcia,* 471 U.S 261 (1985) respecting states with multiple statutes of limitations. Hence, the argument goes, there was no "settled law" for *Owens* to overrule.

I cannot agree with plaintiff, for the lens which he uses to view the state of the law is too wide. My view, and the law that I am bound to follow, is limited to the legal picture which only the United States Supreme Court and the Third Circuit supplies. Their rulings are the corpus of judge-made law which I follow in federal question cases. *See St. Francis College v. Al-Khazraji*, 107 S. Ct. 2022 at 2022, 2025 (1987) (where, explaining *Chevron*, the court stated that "[it] held that its decision . . . should be applied only prospectively because it overruled clearly established *circuit precedent* on which the (p. 21) complaining party was entitled to rely." (Emphasis added)).

Hence, for this Court's purposes, *Brown* was the "settled" law until *Owens'* advent.

But a Supreme Court decision superseding clear circuit precedent is insufficient, in of itself, to satisfy the first part of the *Chevron* test: for "the party seeking nonretroactive application of the new decision must have *relied* on the prior law. Moreover, such reliance must have been *reasonable*." *Mineo v. Port Authority of New York & New Jersey*, 779 F.2d 939 at 945 (3d Cir. 1985), *cert. denied*, 478 U.S. 1005 (1986).

I find that the defendants relied on *Brown v. Foley*, *supra*, inasmuch as they argued that the proposition flowing from it – namely, the application of the two-year statute of limitations in Section 1983 actions – was a proper statement of the law and that I should follow it. That I did follow *Brown* in my earlier opinions is itself indicative of individual defendants' reasonable reliance on that decision.

It would be ironic to hold that the defendants improperly relied on the observation that a two-year statute of limitation applied to Section 1983 actions considering the fact that I had predicated my earlier decision barring plaintiff's claims upon it. I therefore find that the first prong of the *Chevron* test weighs against retroactive application of *Owens, supra.*

Let me deal with the history and purpose of the rule.

(p. 22) The second prong of the *Chevron* test is that "the merits and demerits in each case must be weighed by looking to the history of the rule in dispute, its purpose and effect and whether retrospective operation will further or retard the rule's operation." *See Hill, cited supra,* at 697.

Neither side has advanced any substantive arguments with respect to this prong – in fact, plaintiff appears to have chosen not to treat it at all, *see* plaintiff's brief at 6, while the defendants indicate that *Chevron's* second prong is neutral with respect to Section 1983 claims. And Mr. Quinn seems to have conceded that this morning in his argument as well.

I agree with the defendants and find that this factor is neutral, neither adding or subtracting from the *Chevron* calculus. *See Al-Khazraji v. St. Francis College, cited supra,* at 513, (the purposes of *Wilson* [and analogously *Owens*] to promote uniformity and minimize unnecessary litigation do not militate in favor or against retroactive application). *See also Hill, cited supra,* at 698 (assuming neutral outcome as to the second prong).

Let me deal with the third factor: Harsh, unjust or unequitable results factor, if I may so term it.

The Third factor in the *Chevron* test is whether retroactive application will achieve harsh, unjust or inequitable results. *See Hill, supra,* at 696.

Here, the individual defendants contend that a (p. 23) retroactive application of *Owens* would work harm to them because (1) up to this time they have not hired personal counsel and now they may be subject to punitive damages claims as individual defendants; (2) defendant Marson has taken a position in his divorce litigation based on the fact that he would not be facing the threat of punitive damages; and (3) discovery has been closed and its reopening is foreclosed due to the age of the case and the impending trial.

The plaintiff answers the defendants' contentions by pointing out that for over three years in this action, the individual defendants were subject to possible punitive damage liability and did not retain individual counsel. Hence, he reasons that the defendants were reckless in not obtaining counsel and should not benefit from this recklessness.

I am not persuaded by defendants' argument regarding retention of counsel. After all, as plaintiff rightly observes, the defendants were under the specter of possible punitive damages liability for three years in this action and did not deem it necessary to retain counsel. Moreover, the defendants' argument that they have not conducted discovery is unavailing as well.

Discovery closed in February of 1986, when the claims against the individual defendants were still viable. I also note, in passing, that the individual defendants have remained in the case based on the City's cross claim for indemnification (p. 24) and contribution and, therefore, have not entirely divorced themselves from the action. Thus, the individual defendants have not shown how they would suffer inequity from the retrospective application of *Owens*.

On the other hand, it is clear that if *Owens* is not applied retroactively, then the plaintiff would suffer the inequity by losing his ability to try the claims against the individual defendants.

In light of the above, then, the third prong of the *Chevron* analysis militates in favor of a retroactive application.

In sum then, looking at the present facts, one *Chevron* factor favors prospective application, one is neutral and the last factor, I find, favors retroactive application. The scale thus appears to be balanced, at first blush leaving me no better off than when I started to examine the question of whether to prospectively or retrospectively apply *Owens*.

However, a closer look at the background law detailing the parties' respective burdens in a *Chevron* analysis indicates that I should retroactively apply *Owens*. In *Druckenmiller v. United States*, 553 F.Supp. 917 (1982), the Eastern District of Pennsylvania noted that a court should accord proper deference to a "longstanding" rule that "judicial precedents normally have retroactive as well as

prospective effect." *See* that opinion at 917 (*quoting National Ass'n of Broadcasters v. FCC*, 554 F.2d (p. 25) 1118, 1130 (D.C. Cir. 1976)).

Thus, the burden is on the party advocating only prospective application to *convince* the Court that such limited application is just. *See Druckenmiller, supra*, at 918 (*citing Talley v. United States Postal Service*, 532 F.Supp. 786, 790 (D.Minn. 1982); *see also NLRB v. Lyon & Ryan Ford, Inc.*, 647 P.2d 745, 757 (7th Cir.) (holding that "[s]ince there is a presumption favoring retroactivity, all three *Chevron* factors must support prospective application in order to limit the retroactive effect of the decision."), *cert. denied*, 454 U.S. 894 (1981).

Since the individual defendants, I find, have not carried their burden, failing to show the need for prospective application with reference to two out of the three *Chevron* factors, I find that they have failed to prove the case for retroactivity.

Thus, I find that I must retroactively apply the *Owens* case here, and, vacate my March 9, 1988 order.

But in doing so – let me say that I have very carefully considered this matter, and it's a very close question. And intellectual honesty, which I hope I still possess, compels me to conclude that pursuant to Section 1292(b) of Title 28 of the United States Code, I feel that I should, in good conscience, and in accordance with the principles set forth by the Third Circuit in *Katz v. Carte Blanche Corp.*, 496 F.2d (p. 26) 747, 754, *cert. denied* 419 U.S. 885 (1974) certify this question.

As Chief Judge Gibbons stated in *Katz*, the statute imposes three criteria for the district court's exercise of discretion to grant a Section 1292(b) certificate. "The order must (1) involve a controlling question of law; (2) offer substantial ground for difference of opinion . . . as to its correctness; and (3) if appealed immediately, materially advance the ultimate termination of the litigation."

For reasons which I will set forth very, very shortly in a few days, in a very short opinion, I find that these conjunctive tests have been met here. And I'm going to, as I said, I'm going to, as I said a few moments ago, certify the question for reasons which I will amplify in my subsequent opinion.

Mr. Mullin, may I respectfully request that you submit an appropriate order consistent with this Court's determination here today?

MR. MULLIN: With the certification portion?

THE COURT: That is correct.

MR. QUINN: Your Honor, just one clarification: You had mentioned, in going through the procedural history of this case, that you had in March of '88 dismissed the federal claims and the pendant state claims. You used the word plural.

The only reason I bring that fact to your Honor's (p. 27) attention is that before March of '88, on other grounds, I know that Mr. Korn had, on behalf of his client, had had Count 6 dismissed, the malpractice claim, not because of statute of limitation but on subsequent grounds. I had also had, I believe, two or three of the

other counts in the complaint dismissed on other grounds.

THE COURT: Obviously, those are exempted by my statement and my purpose –

MR. QUINN: I just wanted to make –

THE COURT: – I had not recognized those antecedent factors explicitly.

MR. QUINN: And you have – on February 27th, you had mentioned that very fact, your Honor.

THE COURT: Nevertheless, your point is well taken.

MR. QUINN: So the only pendent claim that existed in March of '88 was the New Jersey law against discrimination.

THE COURT: The LAD claim.

MR. QUINN: Yes.

THE COURT: I should have said this morning "claim" rather than "claims." And you're quite correct, Mr. Quinn. And, in preparing your order this morning, would you carefully note that?

MR. QUINN: Yes, your Honor.

THE COURT: Thank you.

(The Court stands adjourned.)

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CLEVELAND CHRISTMAS Plaintiff, -vs- JOSEPH MARSON, DOUGLAS BAKER, CHARLES MURPHY, ROBERT ADAIR Defendants.	Hon. Harold A. Ackerman CIVIL ACTION NO. 84-504 A ORDER

This matter having been opened to the Court by the plaintiff, Cleveland Christmas by and through his attorneys, Smith, Mullin & Kiernan, P.C. (Neil Mullin, Esq. appearing) and the defendant City of Englewood having appeared by and through its attorneys Hoagland, Longo, Oropollo & Moran (James B. Moran, Esq. appearing,) and the defendants Dr. Adair having appeared by and through his attorney McDonough, Murray & Korn (Peter L. Korn, Esq. appearing) and all other individual defendants having appeared by and through their attorneys, Wilson, Elser, Edelman and Dicker (Thomas F. Quinn, Esq. appearing) and the Court having heard oral argument upon this matter and having read the written submissions of the parties and for good cause shown;

IT IS on this 24th day of April, 1989

ORDERED that this Court finds and concludes that *Owens v. Okure*, ___ U.S. ___, 109 S. Ct. 573 (1989) should be applied retroactively to this case and such application compels this Court to impose N.J. Stat. Ann. 2A:14-1, New Jersey's six year statute of limitations, on plaintiff's allegations in this case pursuant to 42 U.S.C. sections 1983 and 1985; and

IT IS FURTHER ORDERED that this Court's Order of March 9, 1988 is hereby vacated to the extent that said Order dismissed plaintiff's claims against the individual defendants in this matter pursuant to 42 U.S.C. sections 1983 and 1985 and the New Jersey Law Against Discrimination 10:15-12, *et seq*; those claims are hereby reinstated; and

IT IS FURTHER ORDERED that this Court concludes pursuant to 28 U.S.C. section 1292 (b) that this Order involves a controlling issue of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from this Order may materially advance the ultimate determination of this litigation. Specifically, pursuant to General Rule 23 of the Third Circuit, the controlling question of law is whether N.J. Stat. Ann § 2A:14-1 or § 2A:14-2 should apply to § 1983 actions and § 1985 actions in New Jersey in light of *Owens v. Okure*, 109 S.Ct. 573 (1989)?

IT IS FURTHER ORDERED that pursuant to 28 U.S.C. 1292(b) this matter is stayed until disposition by the Third Circuit or until further Order of this Court.

/s/ Harold A. Ackerman,
HAROLD A. ACKERMAN,
U.S.D.J.

C H A P. DCCLXIV.

An Act for the Limitation of Actions.

Sect. 1. Be It Enacted *by the Council and General Assembly of this state, and it is hereby enacted by the authority of the same,* That all action of trespass *quare chusum fregit,* all actions of trespass, detinue, trover and replevin for taking away of goods and chattels, all actions of debt founded upon any lending or contract without specialty, or for arrearages of rent due on a parol demise, and all actions of account and upon the case, except actions for slander, and except also such actions as concern the trade of merchandise between merchant and merchant, their factors, agents and servants, shall be commenced and sued within six years next after the cause of such actions shall have accrued, and not after.

2. *And be it enacted,* That all actions of trespass for assault, menace, battery, wounding and imprisonment, or any of them, shall be commenced and sued within four years next after the cause of such actions shall have accrued, and not after.

3. *And be it enacted,* That every action upon the case for words, shall be commenced and sued within two years next after the words spoken, and not after.

4. *Provided always, and be it further enacted,* That if any person or persons, who is, are or shall be entitled to any of the actions specified in the three preceding sections of this act, is, are or shall be at the time of any such cause of action accruing, within the age of twenty-one years, some covert or insane, that then such person or persons shall be at liberty to bring the said action, so as he, she or they institute or take the same within such time

as is before limited, after his, her or their coming to or being of full age, discovers or of sane memory, as by other persons having no such impediment might be done.

5. *And be it enacted,* That any prosecution hereafter to be had or commenced upon any bond, heretofore given by any sheriff and his securities, for the faithful performance of the office of sheriff, shall in no wise operate against or in any manner affect the said securities mentioned or bound in said bond, unless such prosecution shall be commenced within six years after the passing of this act; nor shall any prosecution be had or commenced upon any bond hereafter to be given by any sheriff and his securities as aforesaid, in any wise operate against or affect the said securities named and bound in said bond, unless such prosecution shall be commenced within nine years after the date of the said bond, and not after.

6. *And be it enacted,* That every action of debt or covenant for rent or arrearages of rent, founded upon any lease under seal, whether indented or poll, and every action of debt upon any single or penal bill for the payment of money only, or upon any obligation within condition for the payment of money only, or upon any award under the hands and seals of arbitrators for the payment of money only, shall be commenced and sued within sixteen years next after the cause of such action shall have accrued, and not after; but if any payment shall have been made on any such lease, specialty or award, within or after the said period of sixteen years, then an action instituted of such lease, specialty or award, within six years after such payment, shall be good and effectual in law, and not after: *Provided always,* That the time during which the person who is or shall be entitled

to any of the actions specified in this section, shall have been within the age of twenty-one years, feme covert or insane, shall not be taken or computed as part of the said limited period of sixteen years.

7. *And be it enacted*, That judgments in any court of record of this state, may be revived by *scire facias*, or an action of debt may be brought thereon, within twenty years next after the date of such judgment, and not after: *Provided*, That the time during which the person, who is or shall be entitled to the benefit of such judgment, shall have been under the age of twenty-one years, feme covert or infane, shall not be taken or computed as part of the said limited period of twenty years.

8. *And be it enacted*, That if any person or persons, against whom there is or shall be any such cause of action as is specified in any of the preceding sections of this act, is, are or shall be out of this state, at the time of such cause of action accruing, then such person or persons, who is, are or shall be entitled to such action, shall be at liberty to bring the said action against such person or persons, after his, her or their coming or return to this state, so as he, she or they take or institute the same after such coming or return to this state, within such time as if before limited for the bringing of the said action by this act.

9. *And be it enacted*, That no person who now hath or hereafter may have any right or title of entry into any lands, tenements or hereditaments, shall make any entry therein, but within twenty years next after such right or title shall accrue; and such person shall be barred from

any entry afterwards: *Provided always*, That the time during which the person, who hath or shall have such right of entry, shall have been under the age of twenty-one years, feme covert or insane, shall not be taken or computed as part of the said limited period of twenty years.

10. *And be it enacted*, That from and after the first day of January, which will be in the year of our Lord one thousand eight hundred and three, every real, possessory, ancestral, mixed or other action, for any lands, tenements or hereditaments, shall be brought or instituted within ~~twenty years next after the~~ right or title thereto or cause of such action shall accrue, and not after: *Provided always*, That the time during which the person, who hath or shall have such right or title of cause of action, shall have been under the age of twenty-one years, feme covert or insane, shall not be taken or computed as part of the said limited period of twenty years.

11. *And be it enacted*, That if a mortgage and those under him be in possession of the lands, tenements and hereditaments contained in the mortgage, or any part thereof, for twenty years after default of payment by the mortgagor, then the right or equity of redemption therein shall be forever barred.

12. *Provided nevertheless, and be it further enacted*, That if in any of the said actions, specified in any of the preceding sections of this act, judgment be given for the plaintiff, and the same be reversed by writ of error, or if a verdict pass for the plaintiff, and upon matter alledged in arrest of judgment, the judgment be given against the plaintiff, then the said plaintiff, his or hers heirs, executors or administrators, as the case shall require, may

commence a new action within one year after such judgment reversed or given against the plaintiff, and not after.

13. *And be it enacted*, That no person or persons, bodies politic or corporate, shall be sued or impleaded by the state of New Jersey, for any lands, tenements or hereditaments, or for any rents, revenues, issues or profits thereof, but within twenty years after the right, title or cause of action to the same shall accrue, and not after.

14. *And be it enacted*, That the orphan's court of the proper county is hereby empowered to direct executor and administrators to give public notice to the creditors of the illegible of the decedent, to bring in their debts, demands and claims against the same, within such time as the said court shall limit and appoint, not exceeding two years nor less than one year, by setting up such notice in five of the most public places in the said county, for the space of two months, and also by advertising the same for the like space in one or more of the newspapers in this state, and any further notice, in case such court shall judge the same necessary. And if any creditor shall neglect to exhibit his or her debt, demand or claim within the time so limited, after public notice given as aforesaid, such creditor shall be forever barred of his or her action therefor, against such executors or administrators: *Provided always*, That the said executors and administrators, on the payment of any part of the decedents state to any legatee or person claiming distribution thereof, shall take bond to refund as heretofore, and within six months after the expiration of the time so as aforesaid limited by the orphan's court for creditors to come in and claim, shall cause the same to be filed in the clerk's office of such orphan's court, for the use and benefit of such creditor or

creditors as may not have come in and claimed; which said bond or bonds, on application to the said orphan's court and order thereupon, the said creditor or creditors may put in suit against such legatee or person claiming distribution and their sureties, at his, her or their own costs and charges, and for his, her or their own use and benefit; but shall recover no costs thereupon.

15. *And be it enacted*, That all actions or informations, which shall be brought or exhibited for any forfeiture upon any penal statute made or to be made, whereby the said forfeiture is or shall be limited to the state of New Jersey only, shall be brought or exhibited within two years next after the offence committed or to be committed against such penal statute, and not after. And that all actions or informations, which shall be brought or exhibited for any forfeiture upon any penal statute made or to be made, the benefit and suit whereof is or shall be by the said statute, limited or given to any person or persons who shall prosecute for the same, or to the state of New Jersey and to any other who shall prosecute in that behalf, shall be brought or exhibited by any person or persons, who may lawfully pursue for the same as aforesaid, within one year next after the offence committed or to be committed against the said statute; and in default of such pursuit, that then the same shall be brought or exhibited for the state of New Jersey, at any time within one year after the termination of the aforesaid year, and not after. And that all actions or informations, which shall be brought or exhibited for any forfeiture or cause upon any statute made or to be made, the benefit and suit whereof is or shall be limited or given to the party aggrieved, shall be brought or exhibited

within the space of two years next after the offence committed or to be committed or cause of action accrued, and not after: *Provided always,* That where any action or information, is or shall be limited by any statute to be brought or exhibited within a shorter time than is limited by this section, then the said action or information shall be brought or exhibited within such shorter time so limited by such statute.

16. *And be it enacted,* That the act, entitled, "An act for the "limitation of actions and for avoiding suits in law," passed the tenth day of February, in the year of our Lord, one thousand seven hundred and twenty-seven-eight, be and hereby is repealed.

C. Passed at Trenton, February 7, 1799.

I. Limitation of actions.

An act for the limitation of actions.

Revision – Approved March 27, 1874.

1. That all actions of trespass, *quare clausum fregit,* all actions of trespass, detinue, trover, and replevin for taking away of goods and chattels, all actions of debt, founded upon any lending or contract without specialty, or for arrearages of rent due on a parol demise, and all actions of account and upon the case,(*a*)[1] except actions for slander, and except, also, such actions as concern the trade or merchandise between merchant and merchant, their factors, agents, and servants,(*b*) shall be commenced

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[1] Footnotes omitted in printing.

and sued within six years next after the cause of such actions shall have accrued, and not after.(*c*).

2. That all actions of trespass for assault, menace, battery, wounding, and imprisonment, or any of them, shall be commenced and sued within four years next after the cause of such action shall have accrued, and not after.

3. That every action upon the case for words shall be commenced and sued within two years next after the words spoken, and not after.

4. That if any person or persons who is, are, or shall be entitled to any of the actions specified in the three proceeding sections of this act, is, are, or shall be, at the time of any such cause of action accruing, within the age of twenty-one years, or insane,(*d*) that then such person or persons shall be at liberty to bring the said action so as he, she, or they institute or take the same within such time as is before limited after his, her, or their coming to or being of full age, or of sane memory, as by other person or persons having no such impediment might be done.

5. That any prosecution to be had or commenced upon any bond heretofore given or hereafter to be given, by an sheriff and his securities for the faithful performance of the office of sheriff, shall in no wise operate against or in any manner affect the said securities named and bound in said bond, unless such prosecution shall be commenced within nine years after the date of the said bond, and not after; and any prosecution to be had or commenced upon any bond heretofore given or hereafter to be given by any constable and his securities, for the true and faithful performance of all the duties enjoined

on him as constable, shall in no wise operate against or in any manner affect the said securities named and bound in said bond, unless such prosecution shall be commenced within four years after the date of the said bond, and not after.(*e*)

6. That every action of debt or covenant for rent or arrearages of rent, founded upon any lease under seal, whether indented or poll, and every action of debt upon any single or penal bill for the payment of money only, or upon any obligation with condition for the payment of money only, or upon any award under the hands and seals of arbitrators for the payment of money only, shall be commenced and sued within sixteen years next after the cause of such action shall have accrued, and not after(*a*) but if any payment shall have been made on any such lease, specialty, or award, within or after the said period of sixteen years, then an action instituted on such lease, specialty or award, within sixteen years after such payment, shall be good and effectual in law, and not after;(*b*) *provided always*, that the time during which the person who is or shall be entitled to any of the actions specified in this section shall have been within the age of twenty-one years, or insane, shall not be taken or computed as part of the said limited period of sixteen years.

7. That judgments in any court of record of this state may be revived by *seire facias*, or an action of debt may be brought thereon within twenty years next after the date of such judgment, and not after; *provided*, that the time during which the person who is or shall be entitled to the benefit of such judgment shall have been under the age of twenty-one years, or insane shall not be taken or

computed as part of the said limited period of twenty years.(*c*)

8. That if any person or persons against whom there is or shall be any such cause of action as is specified in the first, second, third, fifth, six and seventh sections of this act, shall not be resident in this state when such cause of action accrues, or shall remove from this state after the same shall accrue, and before the time of limitation mentioned in said sections is expired, then the time or times during which such person or persons shall not reside in this state shall not be computed as part of the said limited period within which such action or actions are required to be brought as aforesaid; but the person or persons having, or who may have such cause of action as aforesaid, shall be entitled to all the time mentioned in the said several sections, for bringing their said actions after the cause thereof shall accrue, exclusive of the time or times during which the person or persons liable to such actions shall be not resident in this state as aforesaid.(*d*)

9. That if any person, against whom there is or shall be any such cause of action as is specified in the first, fifth, sixth, or seventh sections of this act, shall have died or shall hereafter die before the expiration of the times of limitation therein mentioned, the space or term of six months next succeeding the death of such person shall not be computed as part of the limited period within which such action or actions is or are required to be brought by the said sections.(*e*)

10. That in actions of debt or upon the case, grounded on any simple contract, no acknowledgment or promise by words only, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of this act, or to deprive any person of the benefit thereof, unless such acknowledgment or promise shall be made or continued by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors or executors, or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of this act so as to be chargeable in respect, or by reason only of any written acknowledgment or promise, and signed by any other or others of them; *provided always,* that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever; *provided also,* that in actions to be commenced against two or more such joint contractors or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by this act as to one or more of such joint contractors or executors or administrators, shall nevertheless, be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise, or otherwise, judgment may be given, and with costs allowed for the plaintiff as to such defendant or defendants, against whom he shall recover, and for the other defendant or defendants against the plaintiff.

11. That no endorsement or memorandum of any payment written or made, after this act shall go into effect, upon any promissory note, bill of exchange, or

other writing, by or on behalf of the party of whom such payment shall be made, shall be deemed sufficient proof of such payment so as to take the case out of the operation of this act.

12. That this act shall be deemed and taken to apply to the case of any debt on simple contract alleged by way of set-off on the part of the defendant.

13. That no action which may be brought upon any bond given by any executor, administrator, guardian, trustee, receiver, or assignee, under any law relating to insolvent debtors or insolvent estates, for the faithful performance of all or any of the duties of such executor, administrator, guardian, trustee, receiver, or assignee, shall in any wise operate against, or in any manner affect the surety or sureties named in said bond, unless such action be commenced within twenty years next after the date of said bond; and such surety or sureties, his or their heirs, devisees, or personal representatives, may plead this act in bar of any action not commenced within that time; *provided*, that the time during which the person who is or shall be entitled to the benefit of such bond shall have been under the age of twenty-one years, or insane, shall not be computed as part of the said limited period of twenty years; *and provided further*, that if any such surety shall not reside in this state when the cause of action accrues on such bond, or shall remove from this state after the same shall accrue, and before the limitation herein mentioned shall expire, then the time or times during which such surety shall not reside in this state shall not, in actions against such surety, his heirs, devisees, or personal representatives, be computed as part of the said limited period; and if any such surety shall die

before the expiration of the time of limitation herein mentioned, then the space or term of six months next succeeding such death shall not, in actions against the heirs, devisees, or personal representatives of such surety, be computed as part of the said limited period.

14. That any prosecution to be had or commenced upon any bond heretofore given, or hereafter to be given, by any insolvent debtor or person arrested upon final process in any civil action, to the sheriff of any county in this state, for the benefit of the prison limits, shall in no wise operate against or in any manner affect the securities named and bound in such bond, unless such prosecution shall be commenced within sixteen years next after the date of said bond.

15. That any prosecution to be had or commenced upon any bond heretofore given, or hereafter to be given, by any justice of the peace and his securities, according to the eleventh section of the act entitled "An act relating to justices of the peace," approved April seventeenth, eighteen hundred and forty-six, shall in no wise operate against, or in any manner may affect the said securities named and bound in said bond, their heirs, executors, or administrators, unless such prosecution shall be commenced within ten years after the date of said bond, and not after.

16. That no person who now hath, or hereafter may have, any right or title of entry into any lands, tenements, or hereditaments, shall make any entry therein, but within twenty years next after such right or title shall accrue; and such person shall be barred from any entry afterwards;(a) *provided always*, that the time during which the

person who hath or shall have such right or title of entry, shall have been under the age of twenty-one years, or insane, shall not be taken or computed as part of the said limited period of twenty years.(*b*)

17. That every real, possessory, ancestral, mixed or other action, for any lands, tenements, or hereditaments, shall be brought or instituted within twenty years next after the right or title thereto, or cause of such action shall accrue, and not after;(*c*) *provided always*, that the time during which the person who hath or shall have such right or title, or cause of action, shall have been under the age of twenty-one years, or insane, shall not be taken or computed as part of the said limited period of twenty years.

18. That if a mortgagee and those under him be in possession of the lands, tenements, and hereditaments contained in the mortgage, or any part thereof, for twenty years after default of payment by the mortgagor, then the right or equity of redemption therein shall be forever barred.(*d*)

19. That if in any of the said actions specified in any of the preceding sections of this act, judgment be given for the plaintiff, and the same be reversed by writ of error, or if a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, then the said plaintiff, his or her heirs, executors or administrators, as the case shall require, may commence a new action within one year after such judgment reversed or given against the plaintiff, and not after.(*e*)

20. That no person or persons, bodies politic, or corporate, shall be sued or impleaded by the state of New Jersey, for any lands, tenements, or hereditaments, or for any rents, revenues, issues, or profits thereof, but within twenty years after the right, title, or cause of action to the same shall accrue, and not after.

21. That all actions or informations which shall be brought or exhibited for any forfeiture upon any penal statute made or to be made, whereby the said forfeiture is or shall be limited to the state of New Jersey only, shall be brought or exhibited within two years next after the offence committed or to be committed against such penal statute, and not after; and all actions or informations, which shall be brought or exhibited for any forfeiture upon any penal statute, made or to be made, the benefit and suit whereof is or shall be by the said statute limited or given to any person or persons who shall prosecute for the same, or to the state of New Jersey, and to any other who shall prosecute in that behalf, shall be brought or exhibited by any person or persons who may lawfully sue for the same as aforesaid, within one year next after the offence committed or to be committed against the said statute; and in default of such suit, then the same shall be brought or exhibited for the state of New Jersey, at any time within one year after the termination of the aforesaid year, and not after; and all actions or informations which shall be brought or exhibited for any forfeiture or cause upon any statute, made or to be made, the benefit and suit whereof is or shall be limited or given to the party aggrieved, shall be brought or exhibited within the space of two years next after the offence committed or to be committed, or cause of action accrued, and not after;

provided always, that where any action or information is or shall be limited by any statute to be brought or exhibited within a shorter time than is limited by this section, then the said action or information shall be brought or exhibited within such shorter time so limited by such statute.(*a*)

22. That all actions or informations which shall be brought or exhibited for any forfeiture upon any penal statute, made or to be made, whereby the said forfeiture is or shall be limited to any county, township, or town corporate, or to any officer of such county, township, or town corporate, or to any person or persons for the use of such county, township, or town corporate, or to the use of the poor of such township or town corporate, either in whole or together with any person or persons who may lawfully sue for the same, shall be brought or exhibited within one year next after the offence committed or to be committed, and not after; *provided always*, that where any action or information is or shall be limited by any statute to be brought or exhibited within a shorter time than is limited by this section, then the said action or information shall be brought or exhibited within such shorter time so limited by such statute.

II. Limitation of suits respecting titles to land.

An act for the limitation of suits respecting titles to land.

Passed June 5, 1787,

WHEREAS the laws, now in force, for the limitation of suits respecting real estates, are found insufficient to

answer the good purposes of quieting claims and securing titles – therefore,

23. SEC. 1. That sixty years' actual possession of any lands, tenements, or other real estate, uninterruptedly continued by occupancy, descent conveyance or otherwise, in whatever way or manner such possession might have commenced, or have been continued, shall vest a full and complete right and title in every actual possessor or occupier of such lands, tenements, or other real estate, and shall be a good and sufficient bar to all claims that may be made, or actions commenced by any person or persons whatever, for the recovery of any such lands, tenements, or other real estate.(*b*)

24. SEC. 2. That thirty years' actual possession of any lands, tenements, or other real estate, uninterruptedly continued as aforesaid, wherever such possession commenced, or is founded upon a proprietary right duly laid thereon, and recorded in the surveyor general's office of the division in which such location was made, or in the secretary's office, agreeably to law, or wherever such possession was obtained by a fair *bona fide* purchase of such lands, tenements, or other real estate, of any person or persons whatever, in possession, and supposed to have a legal right and title thereto, or of the agent or agents of such person or persons, shall be a good and sufficient bar to all prior locations, rights, titles, conveyances, or claims whatever, not followed by actual possession as aforesaid, and shall vest an absolute right and title in the actual possessor and occupier of all such lands, tenements, or other real estate; *provided always*, that if any person or persons, having a right or title to lands, tenements, or other real estate, shall, at the time of the said

right or title first descended or accrued, be within the age of twenty-one years, *feme covert, non compos*, imprisoned, or without the United States of America, then such person or persons, and his and their heir and heirs may notwithstanding the aforesaid times are expired, be entitled to his or their action for the same, so as such person or persons, or his or heirs, commence or sue forth his or their action within five years after his or their full age, discoverture, coming of sound mind, enlargement out of prison, or coming within any of the United States, and at no time after; *and provided also*, that any citizen or citizens of this or any other of the United States, and his or their heirs, having right or title to any lands, tenements, or other real estate within this state, may, notwithstanding the aforesaid times are expired, commence his or their action for such lands, tenements, or other real estate at any time within five years next after the passing of this act, and not afterwards.

25. SEC. 3. That any survey, made of any lands, within either the eastern or western division of the proprietors of the state of New Jersey, and inspected and approved of by the general proprietors, or council of proprietors of such division, and by their order or direction entered upon record in the secretary's office of this state, or in the surveyor general's office in such division, shall, from and after such record is made, preclude and for ever bar such proprietors and their successors from any demand thereon, any plea of deficiency of right or otherwise notwithstanding.(*a*)

26. SEC. 4. That if any person or persons, for the purpose of establishing the boundaries of lands between them, shall, by certificate under their hands and seals,

executed in the presence of two or more subscribing witnesses, certify unto the clerk of the county or counties, wherein such line or partition shall lay, any lines, corners, and boundaries, as shall by them be allowed and acknowledged to be the true bounds betwixt their lands; and the said certificate, filed in said clerk's office, and recorded by said clerk in a book to be by him provided for that purpose, shall be as fully conclusive and binding to the parties so certifying, and their heirs and successors, as could have been done by deeds of quitclaim or in any other manner whatsoever.

Passed November 28, 1789.

Supplement.

WHEREAS, there may be divers ancient surveys of land fairly made, which by the neglect of officers, or through some casualty, have not been put on record, and others, the records whereof have been destroyed by fire or lost; by reason whereof, and the natural decay of marked lines and corners, the ancient metes and bounds cannot be clearly ascertained but by testimony and reputation; and whereas it hath been found, on running the lines of divers such surveys, that they hold more, or extend farther than their strict length of chain, large measures having been formerly allowed, even by the proprietors, as an encouragement to location, of which avaricious persons do, or may take advantage against the owners and possessors of such lands, by confining their surveys to the net length of chain, thereby making vacancies of valuable improved parts, some whereon buildings are erected and made, and on causing surveys to be made of such overplus, have procured and may procure the same

to pass the council of proprietors without legal notice, or due preference given to the possessors, who may have innocently supposed their title was indefeasible, or otherwise would have willinging resurveyed, covered, and secured the same; for remedy whereof in future.

27. SEC. 1. That no such newly made partial survey, now lying within the council of proprietors, or which may hereafter be returned to them, or made on any lands improved or unimproved within what has been usually taken and deemed to be the ancient reputed boundary of such lands, shall be recorded or be of any avail to the person so surveying, unless it shall be made to appear, by the testimony of at least two good and sufficient witnesses, that the possessor or possessors, holding such lands by survey, deed, or otherwise, had been duly notified, for the space of six months previous to the making of such survey, of the intention of doing thereof, and had refused or neglected to resurvey and cover such overplus lands.(*b*)

28. SEC. 2. That if the council of proprietors shall refuse or neglect to give the preference to any prior survey, legally made, or to the possessor or possessors of any tract of land, enabling such possessor or possessors to cover with rights, and secure such overplus lands, which may be found within their ancient bounds, on such possessor or possessors making a resurvey of his or their lands within six months after such legal notice as aforesaid, that it shall and may be lawful for such possessor or possessors or any other person legally authorized on his, her, or their behalf, to cause a resurvey to be made, agreeably to the ancient reputed lines and boundaries, either by a deputy surveyor, or some other person

understanding the art of surveying, and appropriate so many rights thereon as will be sufficient to include the overplus, which surveyor or person so surveying being duly qualified before a justice of the peace of the county wherein the land may lie, that the survey, so by him made, is just according to the best of his knowledge, the same may be produced to the clerk of the county, who is hereby required, on the receipt thereof, to record the same in the book directed to be kept in the respective counties, by the act entitled "An act for the limitation of suits at law respecting titles to land," passed at Burlington the fifth day of June, seventeen hundred and eighty-seven, which survey so made and recorded, shall give such owner and possessor an absolute title in fee. (See SURVEYS).

29. SEC. 3. That nothing in this act contained shall be construed or taken to authorize any person or persons to make any survey within the certain or reputed bounds of any survey, or resurvey made and entered on record agreeably to the said recited act, any large or overplus measure therein contained, notice as aforesaid given, deficiency of rights or other plea to the contrary notwithstanding.

LAWS, SESSION OF 1896.

CHAPTER 77.

An Act to amend an act entitled "An act for the limitation of actions" (Revision), approved March twenty-seventh, one thousand eight hundred and seventy-four.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section three of the act entitled "An act for the limitation of actions" (Revision), approved March twenty-seventh, one thousand eight hundred and seventy-four, be and the same is hereby amended so that the same shall read as follows:

3. Every action upon the case for words shall be commenced and sued within two years next after the words spoken and not after, and that all actions hereafter accruing for injuries to persons caused by the wrongful act, neglect or default of any person or persons, firm or firms, individual or individuals, corporation or corporations within this state, shall be commenced and instituted within two years next after the cause of such action shall have accrued and not after.

2. This act shall take effect immediately.

Approved March 24, 1896.

Subtitle 5. LIMITATION OF CIVIL ACTIONS; ADVERSE POSSESSION.

Chapter

24. Limitations of Actions, §§2:24-1 to 2:24-24.

25. Adverse Possession, §§2:25-1 to 2:25-10.

Chapter 24. LIMITATION OF ACTIONS.

Section

2:24-1. Six years; certain enumerated actions.

2:24-2. Two years; actions for injuries to person by wrongful act.

2:24-3. One year; libel or slander.

2:24-4. Disabilities affecting limitations prescribed by sections 2:24-1, 2:24-2 and 2:24-3.

2:24-5. Sixteen years; actions on lease, specialty or award; effect of payments made; disabilities.

2:24-6. Twenty years; judgments.

2:24-7. Nonresidence; effect on limitations.

2:24-8. Death; effect on limitations.

2:24-9. Acknowledgment or new promise.

2:24-10. Indorsement or memorandum or payment on written obligation; effect.

2:24-11. Set-off.

2:24-12. Twenty years; right of entry into real estate; disabilities.

2:24-13. Twenty years; real actions; disabilities.

2:24-14. Sixty years; claims to real estate by devisees under invalid will as heirs to other real estate mentioned therein.

2:24-15. Twenty years; actions by state for real estate or rents, issues or profits thereof.

2:24-16. Nine years; actions on bonds of sheriffs, county treasurers and city or township collectors or treasurers.

2:24-17. Four years; actions on bonds of constables.

2:24-18. Twenty years; actions on bonds of fiduciaries; disabilities; nonresidence; death.

2:24-19. Sixteen years; actions on prison limits bonds.

2:24-20. Ten years; actions on bonds of justices of the peace.

2:24-21. Two months; actions against sheriffs by claimants of personal property attached or levied upon under execution.

2:24-22. Two years and one year; actions or informations on penal statutes.

2:24-23. New action after judgment reversed or arrested.

2:24-24. Interest on barred claims.

Cross Reference.

Bar of equity of redemption by possession, see §2:65-14 of this title.

2:24-1. Six years; certain enumerated actions. All actions in the nature of trespass quare clausum fregit, trespass, detinue, trover, actions of replevin for the taking away of goods and chattels, actions in the nature of debt, founded upon a lending or contract without a specialty or for arrears of rent due on a parol demise, actions of account, actions in the nature of actions upon the case, except the actions mentioned in section 2:24-2 and section 2:24-3 of this title, shall be commenced within six years next after the cause of any such action has accrued, and

not thereafter. This section shall not apply to such actions as concern the trade or merchandise between merchant and merchant, their factors, agents and servants.

Source. Rev. 1877, p. 594, §1 [C. S. p. 3162, §1].

2:24-2. Two years; action for injuries to person by wrongful act. All actions for injuries to the person caused by the wrongful act, neglect or default of any person or persons, firm or firms, individual or individuals, corporation or corporations within this state shall be commenced within two years next after the cause of any such action shall have accrued, and not thereafter.

Source. Rev. 1877, p. 594, §3, as am, by L. 1896, c. 77, §1, p. 119 [C.S. p. 3164, §3].

2:24-3. One year; libel or slander. Every civil action for libel or slander shall be commenced and sued within one year next after the publication of the alleged libel or slander, and not thereafter.

Source. L. 1934, c. 98, §1, p. 287.

2:24-4. Disabilities, affecting limitations prescribed by sections 2:24-1, 2:24-2 and 2:24-3. If any person entitled to any of the actions specified in sections 2:24-1, 2:24-2 and 2:24-3 of this title is or shall be, at the time of any such cause of action accruing, within the age of twenty-one years, or insane, such person may bring such action, within such time as limited by said sections 2:24-1, 2:24-2, and 2:24-3, after his coming to or being of full age or of sane memory.

Source. Rev. 1877, p. 594, §4 [C. S. p. 3164, §4].

2:24-5. Sixteen years; actions on lease, specialty or award; effect of payments made; disabilities. All actions in the nature of debt or covenant for rent or arrears of rent, founded upon a lease under seal, whether indented or poll, all actions in the nature of actions of debt upon a single or penal bill for the payment of money only, all actions upon an obligation conditioned for the payment of money only or upon an award under the hands and seals of arbitrators for the payment of money only shall be commenced within sixteen years next after the cause of such action accrues, and not thereafter. If, however, any payment is made on any such lease, specialty or award within or after such period of sixteen years, an action thereon may be commenced within sixteen years next after such payment, and not thereafter.

The time during which the person entitled to any of the actions herein specified may be under the age of twenty-one years or insane shall not be computed as a part of the sixteen years.

Source. Rev. 1877, p. 594, §6 [C. S. p. 3165, §6].

2:24-6. Twenty years; judgments. A judgment in any court of record in this state may be revived by scire facias or an action at law may be brought thereon within twenty years next after the date thereof. The time during which the person entitled to the benefit of the judgment shall have been under the age of twenty-one years or insane shall not be computed as a part of such twenty years.

Source. Rev. 1877, p. 595, §7 [C. S. p. 3166, §7].

2:24-7. Nonresidence; effect on limitations. If any person against whom there is or may be a cause of action

specified in sections 2:24-1, 2:24-2, 2:24-3, 2:24-5, 2:24-6, 2:24-16 or 2:24-17 of this title is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, the time or times during which such person is not residing within this state shall not be computed as a part of the periods of time within which such actions are required to be commenced by said sections; and the person entitled to any such action may commence the same after the accrual of the cause therefor; within the periods of time limited therefor by said sections, exclusive of such time or times of non-residence.

Source. Rev. 1877, p. 595, §8 [C. S. p. 3166, §8].

2:24-8. Death; effect on limitations. If any person against whom there is or may be a cause of action specified in sections 2:24-1, 2:24-2, 2:24-5, 2:24-6, 2:24-16 or 2:24-17 of this title has died or shall die before the expiration of the time limited thereby, the space of six months next succeeding such death shall not be computed as a part of the limited periods within which the action is required by said sections to be commenced.

Source. Rev. 1877, p. 595, §9 [C. S. p. 3167, §9].

2:24-9. Acknowledgment or new promise. In actions in the nature of actions of debt or upon the case grounded on any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, so as to take any case out of the operation of this chapter, or to deprive any person of the benefit thereof, unless such acknowledgment or

promise shall be made or continued by or in some writing to be signed by the party chargeable thereby.

Where there shall be two or more joint contractors or executors or administrators of any contractor, no such joint contractor, executor or administrator shall lose the benefit of this chapter so as to be chargeable in respect or by reason only of any written acknowledgment or promise, and signed by another or others of them. Nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever; and if in an action against two or more joint contractors, or executors or administrators of a contractor, it appears at the trial or otherwise that the plaintiff, although barred as to one or more of such joint contractors, or executors or administrators, shall, nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and with costs allowed for the plaintiff as to such defendant or defendants, against whom he shall recover, and for the other defendant or defendants against the plaintiff.

This section shall not be construed to take away, lessen or alter the effect of any payment of principal or interest made by any person on the obligation in suit.

Source. Rev. 1877, p. 595, §10 [C. S. p. 3167, §10].

2:24-10. Indorsement or memorandum of payment on written obligation; effect. No indorsement or memorandum of any payment written or made upon a promissory note, bill of exchange or other writing, by or on behalf of the party to whom the payment is made, shall

be deemed sufficient proof of such payment so as to take the case out of operation of this chapter.

Source. Rev. 1877, p. 596, §11 [C. S. p. 3168, §11].

2:24-11. Set-off. The limitation provided by this chapter shall apply to the case of any debt on simple contract alleged by way of set-off by a defendant.

Source. Rev. 1877, p. 596, §12 [C. S. p. 3168, §12].

2:24-12. Twenty years; right of entry into real estate; disabilities. Every person having any right or title of entry into real estate shall make such entry within twenty years next after the accrual of such right or title of entry, or be barred therefrom thereafter; but the time during which the person having a right or title of entry shall have been insane or under the age of twenty-one years shall not be taken or computed as part of such twenty years.

Source. Rev. 1877, p. 597, §16 [C. S. p. 3169, §16].

2:24-13. Twenty years; real actions; disabilities. Every real, possessory, ancestral, mixed or other action for estate shall be brought within twenty years next after the right or title thereto, or cause of action shall accrue, and not thereafter; but the time during which the person having such right or title, or cause of action, shall have been insane or under the age of twenty-one years shall not be taken or computed as part of such twenty years.

Source. Rev. 1877, p. 597, §17 [C. S. p. 3169, §17].

2:24-14. Sixty years; claims to real estate by devisees under invalid will as heirs to other real estate mentioned therein. Where lands are or have been devised to

two or more persons in severalty by a paper writing purporting to be a last will and testament, executed by the owner of such lands in the presence of two or more witnesses, and such writing is inoperative and void as a will, such persons being the heirs at law of decedent, and such persons, their heirs, executors and assigns, remain or have remained for a period of sixty years after the death of such decedent in the actual or construction possession of the respective parcels of land, so purporting to be devised severally to them, every such person, his heirs, executors and assigns, shall be estopped from claiming any right, title or interest in the lands mentioned in such writing, except in such land as was devised or attempted to be devised to such person in severalty; and no action shall be brought by any such persons, their heirs, executors or assigns, to enforce any right or claim as heir of such decedent in the other mentioned in such writing.

Source. L. 1926, c. 109, §1, p. 172, suppl. to Rev. 1877, p. 594.

2:24-15. Twenty years; actions by state for real estate or rents, issues or profits thereof. No person or body politic or corporate shall be sued or impleaded by the state of New Jersey for any real estate or for any rents, revenues, issues or profits thereof, except within twenty years after the right, title or cause of action to the same shall accrue.

Source. Rev. 1877, p. 597, §20 [C. S. p. 3170, §20].

2:24-16. Nine years; actions on bonds of sheriffs, county treasurers and city or township collectors or treasurers. No prosecution to be had or commenced upon

any bond given or to be given by any sheriff and his sureties for the faithful performance of the office of sheriff, or by any county treasurer and his sureties for the faithful performance of the duties of the office of the treasurer, or by any city or township collector and his sureties for the faithful performance of the duties of the office of such collector or treasurer shall in any way operate against or affect the sureties named and bound in any such bond, unless such prosecution shall be commenced within nine years after the date of any such bond, and not thereafter.

Source. Rev. 1877, p. 594, §5, as am. by L. 1883, c. 25, §1, p. 33 [C. S. p. 3165, §5].

2:24-17. Four years; actions on bonds of constables. No prosecution commenced upon any bond given or to be given by any constable and his sureties for the true and faithful performance of all duties enjoined on him as constable shall in any way operate against or in any manner affect the sureties named in and bound in such bond, unless such prosecution shall be commenced within four years after the date of such bond, and not thereafter.

Source. Rev. 1877, p. 594, §5, as am. by L. 1883, c. 25 §1, p. 33 [C. S. p. 3165, §5].

2:24-18. Twenty years; actions on bonds of fiduciaries; disabilities; nonresidence; death. No action brought upon a bond given by any executor, administrator, guardian, trustee, receiver or assignee, under any law relating to insolvent debtors or insolvent estates, for the faithful performance of any or all of the duties of any of such fiduciaries shall in any way operate against or in

any manner affect the sureties named in and bound by the bond, unless the same is commenced within twenty years next after the date of the bond. Any surety, his heirs, devisees or personal representatives may plead this section in bar of any action not commenced within the time herein prescribed.

The time during which the person entitled to the benefit of the bond may be under the age of twenty-one years or insane shall not be computed as a part of the twenty years.

If any surety on the bond is a nonresident of this state when the cause of action accrues thereon, or removes from the state after the accrual thereof and before the limitation herein mentioned expires, the time during which the surety shall not reside, within the state shall not, in an action against him, his heirs, devisees or personal representatives, be computed as a part of the twenty years.

If any surety on the bond dies before the expiration of the limitation herein prescribed, a period of six months next succeeding such death shall not, in actions against the heirs, devisees or personal representatives of such surety, be computed as part of the twenty years.

Source. Rev. 1877, p. 596, §13 [C. S. p. 3168, §13].

2:24-19. Sixteen years; actions on prison limits bonds. No prosecution commenced upon a prison limits bond, given to the sheriff of any county by an insolvent debtor or person arrested upon final process in a civil action, shall in any way operate against or in any manner affect the sureties named in and bound by the bond,

unless such prosecution shall be commenced within sixteen years next after the date of such bond.

Source omitted.

2:24-20. Ten years; actions on bonds and justices of the peace. No prosecution commenced upon a bond given or to be given by any justice of the peace and his sureties pursuant to section 2:9-11 of this title shall in any way operate against or in any manner affect the sureties named in and bound by such bond, or their heirs, executors or administrators, unless such prosecution shall be commenced within ten years after the date of such bond, and not thereafter.

Source. Rev. 1877, p. 596, §15 [C. S. p. 3168, §15].

2:24-21. Two months; actions against sheriffs by claimants of personal property attached or levied upon under execution. No action shall lie against a sheriff or other officer, either in his official or individual capacity, or against the agent of or person acting for him, by a claimant, other than defendant in attachment or execution, of personal property attached, levied upon, taken or sold by such sheriff or other officer by virtue of a writ of attachment or execution issuing out of any court of this state, to enforce his claim against the sheriff or other officer for such attachment, levy, taking or sale, or to recover the proceeds of such a sale, unless the same is commenced within two months from the time the claimant delivers a written notice of his claim to the sheriff or other officer, his attorney or agent. If no such written notice has been delivered to him, the sheriff or other officer may give written notice of the attachment, levy, taking or sale to any person who he may have reason to

suppose claims, or before a sale claimed, the property so attached, levied upon, taken or sold, who shall thereupon, and within two months from the receipt by him of such notice, bring his action against the sheriff or other officer, or the agent or person acting for him, for the enforcement of his claim, or for damages for such attachment, levy taking or sale, or for the proceeds of such a sale, or be forever thereafter barred therefrom.

This section shall not be construed to affect in any way the liability of any person except such sheriff or officer, in his official capacity and personally, and the agent of such sheriff or officer.

Sources. L. 1896, c. 212, §§1, 3, 4, pp. 358, 359 [C. S. pp. 3171, 3172, §§23, 25, 26].

2:24-22. Two years and one year; actions or informations on penal statutes. All actions or informations which shall be brought or exhibited for any forfeiture upon any penal statute made or to be made, shall be brought or exhibited within the periods of time herein prescribed, and not thereafter:

a. Within two years next after the offense committed or to be committed against the statute, when the forfeiture is or shall be limited by the statute to the state of New Jersey only;

b. Within two years next after the offense committed or to be committed against the statute, or cause of action accrued, when the benefit of the forfeiture and the action therefore is or shall be limited or given to the party aggrieved;

c. Within one year next after the offense committed or to be committed against the statute, when the benefit of the forfeiture and the action therefor is or shall be limited or given by the statute to any person or persons who shall prosecute for the same, or to the state of New Jersey, and to the other who shall prosecute in that behalf, except that, in default of such action the same shall be brought or exhibited for the state of New Jersey, at any time within one year after the termination of the aforesaid year;

d. Within one year next after the offense committed or to be committed against the statute, when the forfeiture is or shall be limited by the statute to any county, township, or town corporate, or to any officer of such county, township, or town corporate, or to any person or persons for the use of such county, township, or town corporate, or to the use of the poor of such township or town corporate, either in whole or together with any other person or persons who may lawfully sue for the same.

Where, however, any action or information is or shall be limited by any statute to be brought or exhibited within a shorter time than is limited by this section, such action or information shall be brought or exhibited within such shorter time so limited by such statute.

Sources. Rev. 1877, pp. 597, 598, §§21, 22 [C. S. pp. 3170, 3171, §§21, 22].

2:24-23. New action after judgment reversed or arrested. If, in any of the actions, proceeding or information specified in sections 2:24-1 to 2:24-20 of this title, judgment is given for the plaintiff therein, and such judgment

is reversed on appeal, or, if a verdict pass for plaintiff and, upon motion in arrest of judgment, judgment, is given against plaintiff, plaintiff, his heirs, executors or administrators, may commence a new action within one year after the judgment is reversed or judgment is given against plaintiff, and not thereafter.

Source. Rev. 1877, p. 597, §19 [C. S. p. 3170, §19].

2:24-24. Interest on barred claims. Whenever any claim or demand which has been or shall become barred by the running of the statute of limitations, and shall have been or shall be revived thereafter by legislative enactment, the holder of such claim shall not collect more in interest thereon by judgment or otherwise than could have been recovered thereon at the time of the expiration of the statutory limit barring recovery thereon.

Source. L. 1906, c. 298, §1, p. 659 [C. S. p. 3172, §27].

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil No. 84-5042

CLEVELAND CHRISTMAS, Plaintiff,	:	TRANSCRIPT OF PROCEEDINGS
-vs-	:	OPINION
JOSEPH MARSON	:	
Defendants.	:	

Newark, New Jersey
February 27, 1989

BEFORE:

THE HONORABLE HAROLD A. ACKERMAN, U.S.D.J.

Appearances:

SMITH, MULLIN & KIERNAN
BY: NEIL M. MULLIN, ESQ.,
Attorneys for the Plaintiff

HOAGLAND, LONGO, OPOPOLLO & MORAN
BY: JAMES J. KINNEALLY, III, ESQ.,
Attorneys for the Defendant City of Englewood

McDONOUGH, MURRAY & KORN
BY: PETER L. KORN, ESQ.,
Attorneys for the Defendant Dr. Adair

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER
BY: THOMAS F. QUINN, ESQ.,
Attorney for all other defendants

* * *

(p. 8) THE COURT: All right, gentlemen.

This is an action brought under the Civil Rights Acts, 42 U.S.C. Sections 1983, 1985, 1986 and 1988, and pendent state statutory and common law, seeking redress from the City of Englewood, New Jersey and various city officials sued in their individual capacities for an employee termination allegedly motivated by racial discrimination.

On March 9, 1988, I dismissed the federal claims against the individual defendants, but not the defendant City of Englewood, as time-barred. I also dismissed the pendent state claim against the individual defendants, but not the defendant City of Englewood pursuant to the doctrine of pendent jurisdiction.

Now, in view of the United States Supreme Court's decision in *Owens v. Okure* No. 87-56, slip op. (January 10, 1989), *reported at* 109 S. Ct. 573, Mr. Christmas has moved this Court to vacate my March 9, 1988 order under Federal Rule of Civil Procedure 59 or 60(b). I will now assess Mr. Christmas' request.

Mr. Christmas filed the within action on December 7, 1984, suing the City of Englewood, Fire Chief Marson, Deputy Chief Douglas Baker, Fire Captain Charles Murphy, Dr. Adair, (p. 9) Mayor Sandra Greenberg, City Manager Kennedy Shaw and City Clerk Jack Drakeford for 42 U.S.C. Sections 1983, 1985, 1986 and 1988 violations, as well as violations of the New Jersey Law Against Discrimination, New Jersey common law and New Jersey public policy.

Specifically, the plaintiff alleged (1) in Count I a conspiracy among all defendants to violate the plaintiff's rights under the first amendment, fourteenth amendment

and the consent decree entered in connection with plaintiff's action before the New Jersey Civil Rights Division;

(2) In Count II, violations due to negligence by the defendants Greenberg, Shaw, Drakeford and Marson of their duty to supervise employees, under the state common law of torts;

(3) In Count III, the failure by the defendants City of Englewood and Mayor Greenberg to use their authority to prevent the Count I conspiracy, of which they were aware – a charge which I shall discuss later – under 42 U.S.C. Section 1986;

(4) In Count IV, violations by defendants City of Englewood, Marson, Baker, Drakeford and Shaw of the New Jersey Law Against Discrimination N.J.S.A. 10:5-1, *et seq.*;

(5) In Count V, tortious interference by all of the defendants with the plaintiff's employment contract;

(6) In Count VI, an allegation that the defendant Adair made a false and erroneous finding regarding the plaintiff's health and a claim of medical malpractice based on the (p. 10) allegation which claim I dismissed in a decision rendered on April 28, 1986 for failure to state a cause of action against defendant Adair; and,

(7) In Count VII, a violation by all of the defendants of the New Jersey public policy.

On July 15, 1987, I ordered, among other things, (1) that Counts 2, 5 and 7 of the complaint be dismissed with prejudice as against the individual defendants based on the doctrine of *res judicata*; (2) that Count 3 of the complaint by dismissed with prejudice on the basis of the

one-year statute of limitations contained in 42 U.S.C. Section 1986; and (3) that a two-year statute of limitations should apply to the Section 1983 and 1985 claims under *Wilson v. Garcia*, 471 U.S. 261 (1985) and *Brown v. Foley*, 810 F.2d 55 (3d Cir. 1987), but that I would reserve decision on whether I should retroactively or prospectively apply the two-year period depending on how the United States Supreme Court decided two cases on appeal from the Third Circuit, both of which treated the retroactivity issue.

After the Court decided *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617 (1987), and *St. Francis College v. Al-Kazraji*, 107 S. Ct. 2022 (1987), I ruled on the retroactivity issue. *See Christmas v. Marson* Civ. A. No. 84-5042, slip op. (D.N.J. March 8, 1988) (unpublished).

There, I applied the two-year statute of limitations period retroactively, barring Mr. Christmas' federal claims (p. 11) against the individual defendants because Mr. Christmas filed his complaints in 1984 and the complained-of event took place on June 5, 1981. *See* Page 3 of my opinion.

In so holding, I applied the test articulated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), opining that there was no clear precedent that the New Jersey six-year statute of limitations should apply. This point was of particular importance in light of the Supreme Court's direction in *St. Francis College, cited supra*, at 2025-26, that *"established circuit precedent"* be "overruled" to justify prospective application. *See* Pages 10 and 11 of my opinion.

Since there was no clear precedent appertaining to the statute-of-limitations issue at the point in time when

the two-year limitations period would have lapsed under the facts in plaintiff's case, I retroactively applied the two-year period. Moreover, I dismissed Mr. Christmas' remaining state claims against the individual defendants under the doctrine of pendent jurisdiction as the United States Court of Appeals for the Third Circuit provided in *Tully v. Mott Supermarkets, Inc.*, 540 F.2d 187 (3d Cir. 1976).

Now, almost a year later, Mr. Christmas brings the present motion to vacate the March 9, 1988 order. He argues that the Supreme Court's decision in *Owens, cited supra*, which I will recount and discuss *infra*, justifies the application of New Jersey's six-year statute of limitations to the instant action. (p. 12) Therefore, Mr. Christmas contends this Court should restore his Section 1983, 1985 and 1988 claims, as well as his pendent New Jersey State Law Against Discrimination claims against the individual defendants.

For their part, the individual defendants contend that the two-year limitations period should apply, arguing, as they have today in supplementing the arguments made in their briefs, that *Owens* stands for the proposition that the federal courts should adopt a general personal injury statute for a Section 1983 claim unless there is no such statute "at which time, as a measure of last resort, a court should choose the residual [six-year] statute of limitations." *See* Defendant's brief at Page 2.

Alternatively, the defendants argue that if the six-year statute of limitations applies, then the doctrine of judicial estoppel should bar the plaintiff's claims against the defendants. Specifically, as I have alluded to in my colloquy this morning with counsel, the defendants point

out that Mr. Christmas claimed in his worker's compensation action that he had a permanent disability upon which he collected $11,000 upon settlement, yet then does "an about face" in this action, arguing that he was not terminated based on disability, but based on race. Such disingenuity, they argue, should compel this Court to dismiss plaintiff's claims against the individual defendants.

(p. 13) Mr. Christmas predicates his motion on either Federal Rule of Civil Procedure 59(c) or Federal Rule of Civil Procedure 60(b). Rule 59, however, is inapplicable because that rule deals with judgments, Rule 60(b) is inapplicable for a similar reason, in that the order at issue here is not a "final judgment, order or proceeding" under Federal Rule of Civil Procedure 60(b).

As the United States Court for the District of Maine observed in *Gagne v. Carl Bauer Schraubenfabrick*, 595 F. Supp. 1081, 1083 (1984) (*quoting* Federal Rule of Civil Procedure 54(b)), where an order granting summary judgment adjudicates the rights of fewer than all the parties in the litigation, the court must consider that order interlocutory. *See generally* 7 J. Moore & J. Lucas, *Moore's Federal Practice*, Paragraph 60.20, at 60-170 to 172 (2d ed. 1987), wherein it is stated:

"In the absence of the 'express determination' and 'express direction' provided by Rule 54(b), an adjudication of one or more but less than all of the claims in an action, or an adjudication as to fewer than all the parties, is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims, or adjudicating the rights and obligations before me."

The file does not indicate a Rule 54(b) certification, nor have the parties indicated in their papers that there was such an express direction. Hence, the present order is (p. 14) interlocutory and, therefore, not susceptible to the strict standards of Rule 60(b) review. *See Johnson v. Town of Pensalem*, 609 F.Supp. 1340, 1342 (R. D. Pa. 1985) (Pollock, J.) (*citing Laffey v. Northwest Airlines, Inc.*, 642 F.2d 578, 583-84 (D.C. Cir. 1980); *Campos v. Puerto Rico Sup Oil Co.*, 536 F.2d 970, 972 n. 6 (1st Cir. 1976), *both cited in* 7 J. Moore & J. Lucas, *cited supra*, Paragraph 60.20 at 60-170 to 172; *see also United States v. Jerry*, 487 F.2d 600, 604-05 (3d Cir. 1973). *Compare* with the strict Rule 60(b) standard articulated in, for example, *Marshall v. Board of Educ.*, 575 F.2d 417, 424 (3d Cir. 1978).

A change of interlocutory orders, like the one in the present case, "[is] left within the plenary power of the court that rendered them to afford such relief from them *as justice* requires." *Johnson, cited supra*, at 1342 (*quoting*, 7 J. Moore & J. Lucas, *supra*, at 60-170); *see Jerry, supra*, at 605, which similarly states that "so long as the district court has jurisdiction over the case, it possesses inherent power over interlocutory orders, and can reconsider them when it is consonant with justice to do so."

I will inquire as to what "is consonant with justice" in this case later, but first I will treat the prime question of whether the United States Supreme Court's decision in *Owens v. OKure* changed the law in this circuit.

In *Brown v. Foley, cited supra*, the United States Court (p. 15) of Appeals for the Third Circuit observed that in view of the United States Supreme Court's decision in *Wilson v. Garcia*, 471 U.S. 261 (1985), the applicable statute

of limitations in all cases brought under Section 1983 is the state statute of limitations which applies to actions for personal injuries. "In New Jersey," the the Third Circuit held, "that statute is (N.J. Stat. Ann. 2A:14-2) which provides that an action for injury to the person caused by wrongful act, neglect or default must be commenced within two years of the accrual of the cause of action." *See also Napier v. Thirty or More Unidentified Federal Agents, Employees, or Officers, Veteran's Admin.*, 855 F.2d 1080, 1087 (3d Cir. 1988) (holding similarly to *Brown*).

On January 10, 1989, however, the United States Supreme Court decided *Owens v. OKure*. There, Mr. Justice Marshall, writing for the Court, observed that with its decision in *Wilson v. Garcia, cited supra*, the Court had hoped to end the "conflict, confusion and uncertainty" attendant to Section 1983 statute of limitations determinations. *See* Page 5 of that opinion.

However, the Court realized that its decision had not completely obviated the confusion among the lower courts. It noted:

"In states where one statute of limitations applies to all personal injury claims, *Wilson* supplies a clear answer. Courts considering Section 1983 claims in a state with multiple (p. 16) statutes of limitations for personal injury actions, however, have differed over how to determine which statute applies. Several courts of appeals have held that the appropriate period is that which the state assigns to certain enumerated intentional torts. . . . Other courts of appeals, by contrast, have endorsed the use of the state residuary statute of limitations for Section 1983 actions." Id. at 5-6.

I've omitted the footnotes.

The Court then found that the use of the state statute of limitations for intentional torts would be "manifestly inappropriate," because different time limits covered different types of intentional torts within most states. To use these provisions would merely transfer the confusion from one brand of provisions to another. *See* Page 9 of the *Owens* opinion. I've omitted the footnotes.

In view of the unacceptable nature of intentional-tort limitations provisions, the Supreme Court held that, in a case where the state had multiple limitations provisions for personal injury actions, courts should borrow the state's general or residual personal injury statute of limitations in which every state only had *one*, thereby eliminating the confusion. *See* Pages 10 and 11 (emphasis added).

The Court observed that these provisions come in one of two forms:

(1) a general provision applying to all personal injury (p. 17) actions with exceptions; or

(2) a residual provision applying to all actions (including personal injury) not specifically provided for elsewhere.

See Pages 11 and 12 and Footnotes 9 and 10 (*citing, e.g.*, Ala. Code Section 6-2-38(1) (Supp. 1988) (for the first genre, pertaining to "[A]ny injury to person or rights of another not arising from contract and not specifically enumerated) & D.C. Code Section 12-301(8) (1981) (for the second genre, pertaining to "actions not otherwise prescribed.") The state statute adhering to one of these

two forms is the one that federal courts should apply in 1983 actions.

In the instant action, as the Supreme Court noted, the State of New Jersey possesses multiple statutes of limitations for personal injury and/or intentional tort. *See* Pages 9-11, Footnote 8.

The two provisions relevant to the inquiry here are as follows:

2A:14-2.

"Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within two years next after the cause of any such action shall have accrued."

2A:14-1.

"Every action at law for trespass to real property, for (p. 18) any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, *for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this Title*, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, shall be commenced within six years next after the cause of any such action shall have accrued.

This section shall not apply to any action for breach of any contract for sale governed by Section 12A:2-725 of the New Jersey Statutes."

I've added the emphasis.

Out of these two statutes, the latter is New Jersey's residual statute as it covers, "any tortious injury to the rights of others not stated in Sections 2A:14-2 and 2A:14-3." The former statute does not fit the Court's categorization as a general provision as the defendants would have me hold, or a residual provision. *See, id.* at 11-12.

The *Owens* Court indicated that the state would only have one residual statute or general personal injury statute. *Id.* at 10-11.

Hence, under the *Owens* analysis, I am bound to apply Section 2A:14-1, instead of Section 2A:14-2, when assessing the (p. 19) timeliness of Section 1983 claims.

I find that application of a six-year statute of limitations would have made Mr. Christmas' complaint against the individual defendants timely, because the complained of event occurred in 1981 and Mr. Christmas filed this action in 1984 – well within the six-year window which 2A:14-1 provides.

I also note, in passing, that this holding today is consistent with the *Wilson* case's rejection of the residual or "catch-all" statute of limitations as the first state statute of limitations to be borrowed. As the *Owens* court commanded: "[c]ourts should resort to residual statutes of limitations *only* where state law provides multiple statutes of limitations for personal injury actions *and* the residual one embraces either explicitly or by judicial construction, unspecified personal injury actions." *See* Page 15, Footnote 12.

Here, as recounted above, New Jersey possesses multiple provisions and the residual statute expressly embraces personal injury actions. *See* 2A:14-1; *see also Owens, supra,* at 14, Footnote 11 (explaining "personal injury" claims).

Thus, I should apply New Jersey's residual statute 2A:14-1 in Section 1983 cases, following the *Owens* mandate. Having found the appropriate limitations period, I must now inquire as to whether justice requires me to vacate my March 8, 1988 decision. This inquiry boils down to whether the *Owens* decision requires retroactive or prospective application, as the (p. 20) Supreme Court articulated in the *Chevron Oil Co., cited supra. See also St. Francis College, cited supra,* at Pages 2025-26 (applying the *Chevron* test).

In *Hill v. Equitable Trust Co.*, 851 F.2d 691, 697 (1988), *rehearing denied* (August 10, 1988), the Third Circuit recently articulated the factors for giving a decision prospective, not retroactive effect:

"(1) The holding must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed;

"(2) The merits and demerits in each case must be weighed by looking to the history of the rule in dispute, its purpose and effect, and whether retrospective operation will further or retard the rule's operation.

"(3) Retrospective application must create the risk of producing substantially inequitable results."

Since the parties have not reached these concerns in their papers, I will not rule on the retroactive/prospective-effect issue at this time, allowing the parties to fully support this issue, if they desire, with supplemental papers.

Moreover, as I am uncertain whether the dismissed claims against the individual defendants are properly before me at this time, the outcome of the *Chevron* test will determine (p. 21) that, I will not entertain the defendant's judicial estoppel argument since it really is a motion to dismiss claims which, I have mentioned, I am not sure are presently before me.

Further, since the individual defendant's claim is in reality a cross-motion for summary judgment to dismiss the claims, the plaintiff should be afforded more time to answer same as requested in his reply under Local Rule 12(c), and the defendant should propound his evidence concerning this application in a manner that comports with the evidentiary rules concerning summary judgment. *See Macklin v. Butler*, 553 F.2d 525, 528 and n. 1 (7th Cir. 1977) (*per curiam*) (*citing Local Union No. 490, United Rubber, Cork, Linoleum & Plastic Workers of Am. AFL-CIO v. Kirkhill Rubber Co.*, 367 F.2d 956, 958 (9th Cir. 1966)); 10A C. Wright, A. Miller, & M. Kane, *Federal Practice & Procedure* Section 2722, at 58 *and cases cited therein; see also* Section 2723, at 65 ("the Court may not take cognizance of positions regarding the facts based on exhibits that are merely a part of the brief and have not been otherwise verified or supported").

In conclusion, the Supreme Court's decision in *Owens v. OKure* indicates that 2A:14-1 (the six-year statute of

limitations provision) applies to Section 1983 claims in New Jersey. However, in deciding whether the vacate an interlocutory order when justice requires, where there's been a change in the law, I must follow the test put forth in *Chevron* (p. 22) and its progeny regarding retroactive/prospective application of the law.

Neither party has briefed this issue. In fairness to both parties, I will not decide whether to grant plaintiff's motion to vacate until I hear more from them on the *Chevron* issue. In this regard, I order that the following briefing schedule be followed . . .